Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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131 pp

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in ruling that a prosecutor's conduct in preparing a witness during grand jury proceedings for the alleged purpose of maliciously prosecuting Respondent falls outside of the scope of advocatory actions protected by absolute immunity.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in the trial court were William G. Moore, Jr. and his wife, Blanche K. Moore. All claims by Mrs. Moore were dismissed by the trial court and no appeal was taken. The defendants in the trial court were Assistant United States Attorney Joseph B. Valder and United States Postal Inspectors Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington, and Norman Robbins. The appellant below was William G. Moore, Jr. The appellees were AUSA Valder and the six Postal Inspectors. Only AUSA Valder is petitioning for a writ of certiorari.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported as *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995), and set out in Appendix at pages 1a-20a ("App. 1a-20a"). The unreported order and opinion of the United States District Court for the District of Columbia granting defendants' motion to dismiss is set out at 21a-40a.

The memorandum opinion of the United States District Court for the Northern District of Texas on the defendants' motion to dismiss is set out in App. 41a-52a.

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court under 28 U.S.C. § 1254. The opinion of the United States Court of Appeals for the District of Columbia Circuit was rendered September 22, 1995. A petition for rehearing and suggestion for rehearing *in banc* was denied on January 23, 1996. Jurisdiction in the Court of Appeals was based on an appeal from the final judgment of the United States District Court for the District of Columbia. 28 U.S.C. § 1291. Jurisdiction in the trial court was based on 28 U.S.C. §§ 1331 and 1367(a), as this is an action arising under the laws of the United States.

I. STATEMENT OF THE CASE

The circuit court's opinion in this case makes new law by carving out two unprecedented exceptions to the absolute immunity afforded prosecutors for their actions as advocates. Ignoring the context and function of the alleged actions at issue -- which involved a prosecutor's preparatory interviews with a grand jury witness -- the court below denied immunity on the basis of two newly created *per se* rules: first, that allegations of witness "coercion" or "intimidation" preclude dismissal on the ground of prosecutorial immunity; and second, that allegations of improper disclosure of grand jury materials to a prospective grand jury witness necessarily fall outside the scope of immune advocacy.

There are three fundamental flaws in the opinion of the District of Columbia Circuit:

First, the District of Columbia Circuit's decision establishes exceptions to the rule of absolute immunity that swallow the rationale for the rule itself. Under the D.C. Circuit's new rule, a plaintiff need only characterize otherwise immune prosecutorial conduct in descriptive terms such as "threaten," "intimidate," and "coerce" to not only defeat the bar of absolute immunity, but also to undermine the protections otherwise afforded the grand jury process.

Second, the decision is contrary to the established doctrine of this Court that the touchstone of absolute immunity is the nature of conduct in which the prosecutor was engaged, not the manner in which it was undertaken.

Third, the decision erroneously concludes, contrary to the facts as pled below by the Respondent, that Petitioner's conduct in vigorously challenging the veracity of a witness during the grand jury phase of a case is "a typical police function" and a "misuse of investigative techniques" and that his alleged disclosure of grand jury material to influence that witness's testimony automatically "has no

functional tie to the judicial process."

This case presents an issue of great importance for the criminal justice system. As this Court has repeatedly recognized, absolute immunity -- that is, immunity that does not turn on the ostensibly wrongful nature of the acts alleged, and that fosters dismissal at the pleading stage -- is essential so prosecutors are not subject to harassment and retaliation by personal lawsuits.

This Court's rulings make clear that the critical issue in deciding upon the application of absolute immunity is *what* the prosecutor is doing, not *how* -- or even how badly -- he or she is alleged to have done it. The purpose of absolute immunity is to afford judges and prosecutors "protection from harassment by unfounded litigation [that] would cause a deflection of the prosecutor's energies from his public duties . . ."[1] Because this issue is of critical importance to the work of prosecutors and because the court of appeals' decision is so at odds with this Court's holdings and with those of other circuits, its ruling warrants this Court's review.

II. STATEMENT OF FACTS

This case arises out of a lawsuit filed by William Moore against the Assistant United States Attorney who prosecuted him and a number of United States Postal Inspectors who worked on the case. Moore and Recognition Equipment, Inc. ("REI"), the company of which he was president, were the subjects of a prosecution that began in 1986, when the United States Attorney for the District of Columbia and the Postal Inspectors were utilizing a grand jury to pursue prosecution based on a series of events involving illegal payments to a member of the Board of Governors of the Postal Service. The prosecutorial focus turned to Moore and REI -- a manufacturer of automated address-reading equipment -- because they appeared to have

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[1] *Burns v. Reed*, 500 U.S. 478, 485 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976)).

been the intended beneficiaries of an established conspiracy to influence the Postal Service.[2]

The facts alleged in the complaint are as follows:[3] One of the key witnesses in the case was William

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[2] That a criminal conspiracy existed was never in question; the grand jury proceedings resulted in guilty pleas by Peter Voss, a member of the Postal Service Board of Governors, on May 30, 1986, and John Gnau, a public relations executive who made payoffs to Voss, on October 17, 1986. A number of others received immunity in exchange for their cooperation. *See United States v. Recognition Equipment, Inc.*, 725 F. Supp. 587, 589 (D.D.C. 1989); App. 74a; Complaint, at ¶ 13; App. 57a-58a. The principal question in the underlying prosecution was whether Moore or his company had knowledge of the conspiracy. *See* 725 F. Supp. at 589; App. 74a; Complaint, at ¶ 14; App. 58a.

[3] Petitioner has closely tracked the allegations of the complaint because those must be taken as true for purposes of a motion to dismiss, as they were by the district court and court of appeals. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). A motion to dismiss is decided, and reviewed, solely on the basis of the facts set out in the complaint. *See, e.g., Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985). The Joint Appendix below, and Respondent's briefs, contained a great deal of material beyond the allegations of the complaint, perhaps because it was relevant to issues involving the Postal Inspectors. Quite properly, the district court and appeals court confined their analysis of the claims against Petitioner to the complaint. Regardless, however, none of the record materials below signal any retreat by Moore from his claim that Valder maliciously prosecuted him and used the alleged grand jury misconduct as the means. Of course, if unnecessarily forced to defend this action, Petitioner would dispute many of the facts and conclusory allegations asserted by Respondent.

Spartin, an individual implicated in the influence-peddling scheme. Spartin was granted immunity in exchange for his cooperation in the case, including grand jury testimony. After Spartin was immunized, Joseph B. Valder, the prosecutor in charge of the case, and a number of Postal Inspectors met with Spartin. During the meeting, Valder allegedly tore up the immunity letter previously supplied to Spartin and also threatened to prosecute his son, allegedly in an effort to "coerce" and "intimidate" Spartin into providing testimony against Moore and REI in the grand jury. Complaint, at ¶ 21; App. 61a. Valder also allegedly showed Spartin "Grand Jury testimony of other witnesses for the purpose of influencing [his] testimony." Complaint, at ¶ 22; App. 61a. Moore's complaint also asserted that Valder had engaged in a variety of other improper acts during the grand jury proceedings, including coercing another witness, withholding and destroying exculpatory evidence, presenting false or incomplete witness statements to the grand jury, and manipulating witness testimony. *See* Complaint, at ¶¶ 15-23; App. 58a-62a.

The complaint alleged that, "[t]hrough the use of the above malicious, improper and unconstitutional tactics AUSA Valder . . . was able to obtain an indictment against [Moore]." Complaint, at ¶ 24; App. 62a. Moore and his company were, in fact, indicted by the grand jury for conspiring to defraud the United States and tried in the United States District Court for the District of Columbia. Complaint, at ¶ 22; App. 61a. At the close of the government's case, the defendant's motion for judgment of acquittal was granted on all counts by the district court based on insufficient evidence of criminal knowledge. *See United States v. Recognition Equipment, Inc.*, 725 F. Supp. 587, 602 (D.D.C. 1989); App. 100a.

In 1991, Moore filed a *Bivens*[4] action against Valder and a number of Postal Inspectors in the United States District Court for the Northern District of Texas. As is clear

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[4] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

from the quotations above, the heart of the complaint was the allegation that Valder and the Inspectors sought to indict Moore and abused the grand jury process to accomplish that result. Specifically, the complaint alleged that:

> Defendants engaged in unusual, unlawful, and unconstitutional investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted.

Complaint, at ¶ 16; App. 59a. In short, Moore claimed that the defendants had maliciously prosecuted him to advance their own careers and to punish him for exercising his First Amendment rights in criticizing the Postal Service's handling of automated mail reading. Complaint, at ¶¶ 16, 28; App. 59a, 63a. The complaint recognized that immunity could bar the suit, but asserted that what it termed "official immunity" should not apply to AUSA Valder because: (1) Valder violated Moore's constitutional rights; (2) he displayed malicious intent; (3) his actions were not discretionary because they violated policy and regulations; (4) by acting in an investigative capacity, Valder lost his objectivity; (5) Valder's actions were non-advocatory because he withheld and failed to preserve exculpatory evidence; and (6) Valder gave poor legal advice to the Postal Inspectors. Complaint at ¶ 31; App. 63a-64a.

In September 1992, the district court in Texas dismissed all claims against Valder on the grounds of absolute immunity, finding that the conduct complained of involved the prosecutor's preparation and presentation of the case to the grand jury and, therefore, Valder was entitled to absolute immunity. Memorandum Order, Sept. 21, 1992, at 5-7; App. 44a-46a. The trial court recognized that all of the conduct alleged "was preparatory to presenting a case against Moore to the grand jury," and that the complaint, on its face, "compels the conclusion that all of the acts attributed to Valder were prosecutorial functions . . . ." *Id.* at 7; App. 46a. The Texas district court also dismissed claims brought

by Moore's wife, but refused to dismiss portions of the case against the Postal Inspectors. The court then transferred what remained of the case to the United States District Court for the District of Columbia. *Id.* at 7-14; App. 49a-52a. In the meantime, Moore had filed a separate action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, which was also transferred to the District of Columbia, where it was consolidated with the *Bivens* action. In September 1993, the District of Columbia District Court dismissed the remaining claims against the Inspectors and the United States and entered final judgment in favor of all defendants. Memorandum Opinion, Sept. 24, 1993; App. 21a-40a. Moore then appealed.

The court of appeals decided the case on September 22, 1995.[5] As to Valder, the court (Edwards, C.J., and Wald and Henderson, JJ.) first reviewed this Court's decisions on prosecutorial immunity and acknowledged that absolute immunity extends to all "advocatory conduct." Writing for the Court, Judge Henderson stated:

> Advocatory conduct protected by absolute immunity "include[s] the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made."

65 F.3d at 193-94 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615 (1993)); App. 11a-12a. By contrast, the court noted, a prosecutor is entitled only to qualified immunity where he "'performs the investigative functions normally performed by a detective or police officer

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[5] The court of appeals reversed and remanded portions of the case related to the Postal Inspectors and the Federal Tort Claims Act allegations against the United States. A motion to stay the district court proceedings as to Valder was filed May 20, 1996 in that court by the Department of Justice and is pending.

. . .'" *Id.* at 194 (quoting *Buckley*, 509 U.S. at 273); App. 12a. On that basis, the court affirmed the dismissal on absolute immunity grounds of all allegations related to Valder's "decisions regarding what evidence to put before the grand jury, and in what manner" -- including the alleged distortions and omissions in that presentation -- as well as claims based on any post-indictment failure to disclose exculpatory evidence to Moore. 65 F.3d at 194; App. 12a-13a.

The court of appeals, however, carved out two far-reaching exceptions to the application of absolute prosecutorial immunity and reversed the district court's immunity disposition with respect to two instances of conduct alleged in the complaint. First, the court decreed that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory." *Id.* at 194; App. 13a. Instead, the court opined, such conduct is "a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete . . .," and that it "therefore relates to a typical police function, the collection of information to be used in a prosecution." *Id.* Second, the court ruled that "disclosing grand jury testimony to third parties is not advocatory because it has no functional tie to the judicial process." *Id.* at 195; App. 14a. Likening allegations of such disclosure to the press conference statements found to be outside the scope of absolute immunity in *Buckley*, the court concluded that such "disclosure 'does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions.'" *Id.* (quoting *Buckley*, 509 U.S. at 278).

On these exceptional grounds, the court reinstated Moore's claims against Valder for the allegations that he attempted to "intimidate" and "coerce" immunized witness Spartin to provide false testimony before the grand jury by tearing up his cooperation agreement and threatening to prosecute his son, and that he made "unauthorized disclosure of grand jury material" by showing Spartin such material prior to his grand jury testimony "for the purpose of influencing Spartin's testimony." Complaint, at ¶ 22; App. 61a.

III. ARGUMENT

CONTRARY TO ESTABLISHED DOCTRINE, THE COURT OF APPEALS CREATED NEW EXCEPTIONS TO THE BAR OF ABSOLUTE IMMUNITY.

A. The Doctrine of Absolute Immunity Includes All Advocatory Conduct.

At common law a public prosecutor enjoyed absolute immunity from a suit for defamation, malicious prosecution, or conspiracy based on an indictment and prosecution even if brought corruptly, maliciously, and without probable cause. *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). In *Yaselli*, absolute immunity was found despite the allegations that the prosecutor "maliciously, willfully, and corruptly caused to be introduced and used before the . . . grand jury a great mass of false [and] misleading testimony. . . ." *Id.* at 397. Absolute immunity expressly extended to the willful use of perjured testimony. *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976).

When this Court affirmed *Yaselli v. Goff*, it did so in a *per curiam* opinion relying entirely on cases dealing with absolute judicial immunity. Only in 1976 did the Court first analyze the doctrine of prosecutorial immunity in detail, doing so in the context of a § 1983 action.[6] *Imbler v.*

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[6] 42 U.S.C. § 1983 provides:

> Every person who, under color of any [law] of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

Pachtman, 424 U.S. 409 (1976). Although 42 U.S.C. § 1983 applies to "[e]very person" who acts under color of state law to deprive another of his constitutional rights, this Court has held since 1951 that immunities "well grounded in history and reason" were not abrogated by § 1983.[7] *See Tenney v. Blandhove*, 341 U.S. 367, 372 (1951). In *Imbler*, the Court found that an absolute immunity for prosecutors, which shields them from having even to defend against a civil claim for money damages, is historically well-grounded and desirable in policy.

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grant [sic] jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.
>
> . . .
>
> We conclude that the considerations outlined above [of distraction, risk of unjust liability, and considerations of efficient and fair administration of justice] dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law.

424 U.S. at 422-23, 427.

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

[7] The law of immunity under 42 U.S.C. § 1983 applies equally to *Bivens* actions. *See Butz v. Economou*, 438 U.S. 478, 504 (1978).

The *Imbler* court noted that the court of appeals, in finding that respondent's activities were an "integral part of the judicial process," had intended to recognize and preserve cases holding that, when a prosecutor engages in certain investigative functions, he is only entitled to the qualified immunity accorded to police officers. 424 U.S. at 430. The *Imbler* court found it unnecessary to decide whether the distinction should be preserved, deciding only that, in initiating and in presenting the state's case, a prosecutor is clearly immune. 424 U.S. at 430-31.

Between 1976 and 1991, most courts of appeals recognized the distinction between prosecutorial functions entitled to absolute immunity and investigative or administrative acts entitled only to a qualified privilege. *Burns v. Reed*, 500 U.S. 478, 483 n.2 (1991). The courts split, however, on whether the rendition of advice to the police was one or the other. *Id.* In *Burns v. Reed*, this Court held that participation in a probable cause hearing to obtain a search warrant was absolutely privileged.

> Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding) and also for eliciting false and defamatory testimony from witnesses.

500 U.S. at 489-90. This immunity extended to "any hearing before a tribunal which perform[ed] a judicial function" and to "conduct before grand juries." 500 U.S. at 490 (citations omitted) and n.6.

The Court, however, deemed the providing of legal advice to police to be only qualifiedly privileged because it lacked a tradition of common law absolute immunity and was not "intimately associated with the judicial phase of the criminal process." *Id.* at 493 (quoting *Imbler*, 424 U.S. at 430). In fact, at common law, the prosecutorial privilege did not extend to "persons whose function it is to aid in the

enforcement of the criminal law" or to a false arrest claim. Restatement, Torts § 656, comment d. It did, however, in its defamation prong, clearly extend to "conferences and other communications" preliminary to court proceedings. Restatement, Torts § 586, comment a.

The Court addressed prosecutorial immunity most recently in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). There, the Court rejected as extreme the argument that absolute prosecutorial immunity "extends only to the act of initiation [of prosecution] itself and to conduct occurring in the courtroom." 509 U.S. at 272. The Court expressly acknowledged that "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity." *Id.* (citations omitted).

> [A]n out-of-court "effort to control the presentation of [a] witness' testimony . . ." [is] entitled to absolute immunity because it . . . [is] "fairly within [the prosecutor's] function as an advocate."

509 U.S. at 272-73 (citations omitted).

The *Buckley* majority opinion used an examination of probable cause as an aid in the inquiry into the police-prosecutor dichotomy. 509 U.S. at 273-74. This analysis has no application to this case, where it is alleged that the misconduct occurred in the course of obtaining an unjust and otherwise unobtainable indictment. Complaint, at ¶¶ 16, 22; App. 59a, 61a. Obtaining an indictment without probable cause has always been absolutely immunized.[8] Respondent

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[8] In *Buckley*, the prosecutorial misconduct alleged was the fabrication of evidence in concert with police early in the investigation and extra-judicial statements to the press prejudicing public opinion against the defendant. 509 U.S. at 262. The contrast between the prosecutor's conduct in this

in this case attempted to avoid the bar of immunity by alleging that the *means* used to affect the control of testimony -- coercion, intimidation, and sharing of other grand jury testimony (Complaint, at ¶¶ 21-23; App. 61a-62a) -- removed the activity of controlling potential testimony from the advocatory function. The issue raised by the D.C. Circuit's holding, therefore, is whether the means a prosecutor uses to control the substance of grand jury testimony can convert traditionally immune activity into conduct that falls outside the scope of absolute immunity.

Decisions of this Court and the courts of appeals foreclose an affirmative answer to this question. As Judge Learned Hand wrote:

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had

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case and that held in *Buckley* to be outside the protection of absolute immunity is clear. In *Buckley*, the Court held that the allegations of the fabrication of evidence by police and prosecutors during the preliminary investigation of a crime, well prior to the impanelment of a grand jury, was not advocatory but investigative, and that remarks to the press had no history of common law absolute immunity. *Id.* at 274.

> been using his power for any of the purposes on whose account it was vested in him.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

Similarly, this Court has said:

> Of course, a judge's direction to police officers to carry out a judicial order with excessive force is not a "function normally performed by a judge." But if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "nonjudicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority." Accordingly, . . . the relevant inquiry is the "nature" and "function" of the act, not the "act itself." In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court.

Mireles v. Waco, 502 U.S. 9, 12-13 (1991) (citations omitted).

This reasoning and rationale remains vital in the Court's immunity jurisprudence today:

> As we have noted, the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful.

Buckley, 509 U.S. at 271.

Historically, then, an allegation that even intentionally false testimony has been presented to a grand jury has been absolutely privileged. The allegation that a prosecutor has sought to procure such testimony through out-of-court activities has also been absolutely privileged. This is so because witness preparation and presentation is a core prosecutorial function. The allegation that the function was performed maliciously or corruptly, without proper cause or intent, or that the means employed were wrongful, excessive, or improper is without doctrinal significance. Such allegations must always be present, for otherwise there would be no case to begin with. Yet it is the policy of the law that a prosecutor will not be held to answer them in a civil suit for money damages, but will instead only be liable for ethical sanctions, criminal prosecution or other appropriate punishment. The District of Columbia Circuit wrongly decided the case on history, doctrine, and policy.

B. The Alleged Effort To Control Testimony In Order To Obtain An Indictment Was Plainly Advocatory.

In the present case, the court of appeals panel purported to recognize that the advocatory conduct subject to absolute immunity "include[s] the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." 65 F.3d at 193-94 (quoting *Buckley*, 509 U.S. at 273); *see also Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996) (affirming dismissal of claim that AUSA fabricated evidence to indict because a prosecutor "enjoys absolute immunity from claims that she made false representations and suborned perjury before the grand jury"). Under this Court's decisions, the analysis should have stopped there because the crux of Moore's complaint was that Valder's alleged misconduct all occurred during the grand jury proceedings in his drive to indict and convict Moore of crimes he allegedly had not committed.

If a prosecutor and police officers talk to a potential witness at an early stage of an investigation, prior to the

empaneling of a grand jury and before the investigation has focused on a particular individual, such an interview may be "entirely investigative in character," and hence non-advocatory. *See Buckley*, 509 U.S. at 274. This is true regardless of whether the interview is conducted properly, "coercively," or any other way. If, by contrast, a prosecutor conducts an interview with a witness in order to prepare for the presentation of that witness at trial or before a grand jury, then such an interview plainly serves an advocatory function. This, too, remains true regardless of how the interview is conducted. *Buckley* makes clear that what is to be analyzed is the function being performed, not the manner of performance. Other courts of appeals have expressly recognized that a witness interview in preparation for the witness's presentation to a grand jury is protected advocatory conduct. *See Rose v. Bartle*, 871 F.2d 331, 344-45 (3d Cir. 1989); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980) (prosecutor "would have been negligent . . . had he not interviewed witnesses before presenting their testimony to the Grand Jury"); *see also Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir. 1984) (conferring with witness for the purpose of determining whether to bring charges before administrative body is advocatory even where allegation is that witnesses were induced to lie), *cert. denied*, 469 U.S. 1127 (1985); *cf. Brodnicki v. City of Omaha*, 75 F.3d 1261, 1267-68 (8th Cir. 1996) (prosecutor entitled to absolute immunity for interviews of defense alibi witnesses conducted during pendency of bond revocation hearing). The D. C. Circuit's decision and its rationale are clearly contrary to the established case law from other circuits.[9]

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[9] The D.C. Circuit itself has held that an investigation by a prosecutor focused on one target is the hallmark of advocatory conduct, even if it involves multiple grand juries over a period of years. *Gray v. Bell*, 712 F.2d 490, 500-01, 503 (D.C. Cir. 1983) (Edwards, J.) (An "important clue" to advocatory conduct is an investigation focused on a specific target and involving adversity, that is, a situation in which a prosecutor's decisions "must by definition be threatening and coercive").

Moreover, because interviewing witnesses in preparation for their presentation to a grand jury is an advocatory *function*, the very point of absolute immunity is that such conduct is immune from suit *regardless* of whether it is alleged to have been done improperly or in a malicious manner. In stark contrast to the D.C. Circuit's ruling in this case, the Third, Fifth, and Eighth Circuits have all held that allegations of witness coercion fit comfortably within this Court's definition of advocatory conduct. The Third Circuit in *Rose v. Bartle* specifically rejected the argument that charges of "coercion" place witness interviews outside the scope of absolute immunity. *See* 871 F.2d at 343-44. Similarly, in *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995), the court held that absolute immunity barred a lawsuit based on allegations that the prosecutor "knew of and probably directed the intimidation of witnesses." In *Myers v. Morris*, 810 F.2d 1437, 1449-50 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987), the court likewise recognized that witness interviews do not lose immunity by virtue of allegations of coercion or perjured testimony. *See also Pinaud v. County of Suffolk*, 52 F.3d 1139, 1150 (2d Cir. 1995) (rejecting argument based on alleged effort to "coerce a guilty plea," because immunity "depends upon the nature of the activity in question, and not upon how wrongly the particular actors may have performed that activity").

The reality of criminal prosecution is that witnesses are often recalcitrant and tend toward prevarication or equivocation. A prosecutor doing his or her job properly may well have to be strongly assertive in interviewing such witnesses prior to trial or grand jury presentations. Given the impossibility of drawing a clear line between proper assertiveness and "coercion," the appeals court's analysis would make it shockingly easy for a plaintiff suing a prosecutor to avoid an immunity dismissal by artfully pleading "coercion" or "intimidation" of witnesses. The practical result would be to subject prosecutors to precisely the sort of retaliatory litigation that absolute immunity shields and that can undermine the criminal justice system by deterring "vigorous and fearless performance of the prosecutor's duty." *See Imbler*, 424 U.S. at 427.

Moreover, whatever the truth of the allegations that Valder threatened to revoke Spartin's immunity and prosecute his son, they point to conduct that is necessarily advocatory; just as a decision to prosecute is advocatory, so, too, is a communication threatening prosecution. *See Gray v. Bell*, 712 F.2d 490, 501 (D.C. Cir. 1983) (citing *Goldschmidt v. Patchett*, 686 F.2d 582 (7th Cir. 1982)); *accord Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987). Thus, any supposed threats to prosecute would necessarily fall within the range of absolute immunity, even assuming that there was something wrongful and "coercive" about the prosecutor's statements. Similarly, even apart from the nexus of the prosecutor's conduct to the grand jury proceedings, providing or withholding immunity is uniquely a prosecutorial function. 18 U.S.C. § 6003; *see Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983).

To pierce the shield of absolute immunity for those interviews involving "coercion" and "intimidation" gives even an experienced prosecutor a chill. Preparation interviews are frequently not congenial events, especially where the witnesses in question are themselves suspected conspirators, who are being granted immunity in exchange for their cooperation, including truthful testimony. If such interviews are not recognized as part of the advocatory conduct protected by absolute immunity, then a core aspect of prosecutorial activity will be unprotected, contrary to the principles of *Imbler*, *Burns*, and *Buckley*.[10]

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[10] We do not, of course, mean to suggest that the sort of conduct *alleged* in this case should be condoned, or that prosecutors should be able to engage in such tactics with impunity. As this Court recognized in *Imbler*, however, other forms of protection -- such as attorney discipline by the courts, bar associations, and, in the case of federal prosecutors, the Attorney General -- exist to ensure that such abuses do not go unchecked. *See* 424 U.S. at 429. These mechanisms are likely even more potent now than they were when *Imbler* was decided, in light of the greater willingness of the courts to impose sanctions and the Justice

The D.C. Circuit's reasoning in this case turns established doctrine on its head. Rather than analyze what function the prosecutor was performing, that is, preparing a witness for grand jury testimony, the circuit court examined how he was performing that function. That mode of analysis converts this Court's functionality test into a means test. Under the circuit court's rule, this Court's doctrine is eviscerated and replaced by a new test that renders cognizable virtually any claim that a prosecutor used unconstitutional means to pursue a prosecution. That error is all the more glaring in the factual context of this case because the gravamen of Respondent's complaint is simply a claim of malicious prosecution.

This Court's decisions also establish protections for the independence of the grand jury process and hold that an indictment will not be dismissed for alleged prosecutorial misconduct absent a showing of prejudice to the defendants. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). Even a challenge to the reliability or competence of the evidence presented to a grand jury fails if the indictment is valid on its face. *Id.* at 261 (citing *United States v. Calandra*, 414 U.S. 338, 344-45 (1974)). However, as the Court observed in *Bank of Nova Scotia*, if a prosecutor "had threatened to withdraw immunity from a witness in order to manipulate that witness' testimony, this might have given rise to a finding of prejudice." 487 U.S. at 262. But, as the Court further observed, the witness' subjective fear cannot necessarily be ascribed to governmental misconduct. *Id.*

Undoubtedly, some instances of prosecutorial misconduct justify the remedy of dismissing an indictment. *See Bank of Nova Scotia*, 487 U.S. at 256-57 (collecting cases).

Department's strengthening of internal controls on attorney conduct. On the other hand, the encouragement of personal liability suits against prosecutors -- which the court of appeals' ruling here would do -- is neither necessary to check abusive tactics, nor desirable in light of the dangers it would pose to prosecutorial zeal and independence.

The existence of that safeguard only underscores the danger posed by the circuit court's ruling in this case, which would allow a personal attack on the prosecutor's conduct during grand jury proceedings. That new avenue subverts the core purpose of both absolute immunity, which is to permit the prosecutor to exercise the "courage and independence,"*Imbler*, 424 U.S. at 423, required of his office, free from the threat of retaliatory lawsuits, and the substantial protections afforded to grand jury proceedings.

C. The Alleged Disclosure Of Grand Jury Information To Influence A Witness's Testimony Falls Within The Scope of Absolute Immunity.

The court of appeals committed an analogous error in holding that "disclosing grand jury testimony to unauthorized third parties is not advocatory because it has no functional tie to the judicial process." 65 F.3d at 195; App. 14a. Here again, the court erred by adopting a new *per se* rule based on the alleged impropriety of a particular manner of conduct, rather than using the "functional" analysis employed by this Court, and followed in other Circuits, to determine the prosecutor's role at the time of the event. As with the exception carved out for "coercion," granting disgruntled criminal defendants the right to bypass absolute immunity by claiming violations of Federal Rule of Criminal Procedure 6 represents a striking departure from this Court's precedents.

One can easily agree that the unauthorized disclosure of grand jury materials is not *necessarily* part of the advocatory functions of a prosecutor. For example, if a plaintiff made allegations that a prosecutor revealed grand jury materials in the course of giving a press conference, such actions would clearly not be advocatory, because a prosecutor speaking at a press conference is not acting in "his role as advocate for the State." *Buckley*, 509 U.S. at 277-78. Just as clearly, however, if a plaintiff alleged that a prosecutor read from grand jury materials in his closing argument to the trial jury, that action, while bizarre, would unquestionably be at the very core of the "advocatory"

actions protected by absolute immunity.

The record is clear that the only claimed disclosure of grand jury materials for which AUSA Valder is faulted is a claimed disclosure to William Spartin, "for the purpose of influencing Spartin's testimony." Complaint, at ¶ 22; App. 61a.[11] While the disclosure of grand jury materials in that context could presumably be a violation of Fed. R. Crim. P. 6, the alleged improper nature of such disclosure is of no relevance to the immunity issue. Under this Court's functional approach, what matters is the relationship of the alleged disclosure to the prosecution function. The Third Circuit recognized this principle in *Rose v. Bartle*, holding that whether a claimed disclosure of grand jury materials is covered by absolute immunity depends upon the role of the persons by whom and to whom the disclosure is made, and whether disclosure occurs in the course of "'preparation and prosecution of the case.'" 871 F.2d at 346 (quoting *Weg v. Macchiarola*, 654 F. Supp. 1189, 1194 (S.D.N.Y. 1987)). Here, Moore's own allegations place the claimed disclosure to Mr. Spartin in the latter category, and AUSA Valder is shielded by absolute immunity regarding those allegations.

IV. CONCLUSION

In *Imbler*, the Court spoke directly to this case:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the

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[11] Although this paragraph of the Complaint is ambiguous because it combines allegations concerning AUSA Valder and the other individual defendants, plaintiff has made clear there is no allegation that AUSA Valder was involved in the other claimed disclosure, to former Postmaster General Carlin. *See* Appellant's Brief, *Moore v. Valder*, D.C. Cir. Nos. 93-5341, 93-5343, at 14-15.

> conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages.

424 U.S. at 426, n.24 (citation omitted). The court of appeals decision in this case is not only wrong on the facts of this case, but also creates a new standard that seriously undermines this Court's efforts to set forth a "functional" test to clearly mark the boundaries of absolute immunity. Respondent Moore fashioned a *Bivens* claim by alleging that AUSA Valder obtained an indictment without probable cause by using false and misleading testimony. Such an allegation has been subject to absolute immunity for at least 70 years. For the D.C. Circuit to now remove immunity in that circumstance by focusing on the means used -- alleged coercion and Rule 6 violations -- represents a stark departure from *Buckley*, where the Court merely intended to clarify the old common law investigative/prosecutorial dichotomy. If left to stand, the decision below will allow creative pleading to overturn twenty years of this Court's precedents and an entire body of common law immunity decisions. The D.C. Circuit's error in creating a new rule for the application of absolute immunity is too freighted with adverse consequences to the public interest to escape review.

Respectfully submitted,

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June 7, 1996

William G. MOORE, Jr., Appellant,

v.

Joseph B. VALDER, et al., Appellees.
Nos. 93-5341, 93-5343.

United States Court of Appeals,
District of Columbia Circuit.
Argued Jan. 18, 1995.
Decided Sept. 22, 1995.

Rehearing and Suggestion for Rehearing In Banc Denied Jan. 23, 1996.

Plaintiff who was unsuccessfully prosecuted for fraud brought action against federal prosecutor, Postal Service inspectors and the United States, alleging malicious prosecution, retaliatory prosecution, and claim under Federal Tort Claims Act (FTCA). The United States District Court for the District of Columbia, Norma Holloway Johnson, J., dismissed claims, and plaintiff appealed. The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that: (1) prosecutor was absolutely immune from liability for decision to prosecute, for allegedly concealing exculpatory evidence from grand jury, and for allegedly manipulating evidence before grand jury; (2) prosecutor was not entitled to absolute immunity for alleged misconduct of intimidating and coercing witnesses and disclosing grand jury testimony to unauthorized third parties; (3) whether malicious prosecution violated constitutional or statutory rights was not clearly established; (4) inspectors were not entitled to qualified immunity in connection with retaliatory prosecution claim; and (5) alleged misconduct, except for disclosure of grand jury testimony to unauthorized third parties, fell within discretionary exception under FTCA.

Affirmed in part, reversed in part, and remanded.

[1] FEDERAL COURTS k776
170Bk776
Court of Appeals reviews de novo dismissal for failure to state claim upon which relief can be granted, but accepts facts as alleged in complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] DISTRICT AND PROSECUTING ATTORNEYS k10
131k10
Federal prosecutor was absolutely immune from liability for advocatory decisions including decision to prosecute individual for fraud, allegedly concealing exculpatory evidence from grand jury and allegedly manipulating evidence before grand jury to create false impression regarding individual's knowledge about alleged fraudulent scheme.

[3] DISTRICT AND PROSECUTING ATTORNEYS k10
131k10
Prosecutor's withholding of information, after indictment, that is subject to disclosure under Brady is advocatory decision entitled to absolute immunity.

[4] DISTRICT AND PROSECUTING ATTORNEYS k10
131k10
Federal prosecutor was entitled to only qualified immunity, not absolute immunity, from liability for alleged misconduct of intimidating and coercing witnesses into changing their testimony and disclosing grand jury testimony to unauthorized third parties, as such conduct was investigatory, not advocatory.

[5] CIVIL RIGHTS k214(2)
78k214(2)
"Qualified immunity" protects government official who performs discretionary functions from liability for civil damages if official can show that official's actions did not violate clearly established statutory or constitutional rights of which reasonable person would have known.

See publication Words and Phrases for other judicial constructions and definitions.

[6] COURTS k99(7)
106k99(7)
Conclusion of original district court in different circuit, before transfer, that plaintiff asserted facts supporting claim of malicious prosecution, if element of malice was found, did not preclude transferee district court from reconsidering that issue; original district court should not have ruled on issue since it lacked personal jurisdiction over defendants, and transferee district court was bound to follow law of its circuit.

[7] UNITED STATES k50.10(3)
393k50.10(3)
District court erred in deciding that civil rights plaintiff had not met heightened pleading issue regarding defendant postal inspectors' alleged unconstitutional motive, in connection with malicious prosecution claim, before deciding threshold, essentially legal question of whether officials' alleged conduct violated clearly established law.

[8] UNITED STATES k50.10(3)
393k50.10(3)
Postal inspectors were entitled to qualified immunity in plaintiff's civil rights action alleging malicious prosecution, as it was not clearly established that malicious prosecution violated any constitutional or statutory rights.

[9] UNITED STATES k50.10(3)
393k50.10(3)
Postal inspectors were not entitled to qualified immunity in plaintiff's civil rights action alleging retaliatory prosecution based on plaintiff's public criticism of postal service, as retaliatory prosecution based on exercise of First Amendment rights was violation of clearly established law, and evidence indicated that two postal inspectors heard prosecutor state that plaintiff's innocence

was irrelevant to prosecution. U.S.C.A. Const.Amend. 1.

[10] UNITED STATES k78(1)
393k78(1)
Federal Tort Claims Act (FTCA) waives sovereign immunity of United States from suits for negligent or wrongful acts of government employees, subject to certain exceptions. 28 U.S.C.A. ss 2671-2680.

[11] UNITED STATES k78(12)
393k78(12)
Deciding whether to prosecute, assessing witness's credibility to ensure that witness is giving accurate and complete account of witness's knowledge, identifying evidence to submit to grand jury and determining whether information is exculpatory and material under Brady are actions requiring prosecution to exercise professional judgment; thus, such decisions fall within exception for discretionary conduct under Federal Tort Claims Act (FTCA). 28 U.S.C.A. s 2680(a).

[12] UNITED STATES k78(12)
393k78(12)
Decision as to what is required by Department of Justice regulation stating that when prosecutor conducting grand jury inquiry is personally aware of substantial evidence which directly negates guilt of subject of investigation, prosecutor must present or otherwise disclose such evidence to grand jury before seeking indictment against such person, is discretionary act within meaning of Federal Tort Claims Act (FTCA). 28 U.S.C.A. s 2680(a).

[13] UNITED STATES k78(12)
393k78(12)
United States was immune from liability, under discretionary exception to Federal Tort Claims Act (FTCA), as to individual's claims that federal prosecutor and postal inspectors pressured witnesses into incriminating individual, concealed and distorted exculpatory evidence to create false impression of what individual knew about alleged fraud schemes, and withheld material

exculpatory information from individual after grand jury returned indictment. 28 U.S.C.A. s 2680(a).

[14] UNITED STATES k78(12)
393k78(12)
Federal officials' alleged act of disclosing grand jury testimony to unauthorized third parties was not discretionary activity within

meaning of exception under Federal Tort Claims Act (FTCA). 28 U.S.C.A. s 2680(a).

***190** On Appeal from the United States District Court for the District of Columbia (92cv02288 and 93cv00324).

Paul M. Pohl, argued the cause for the appellant. On brief was James E. Anklam.

Robert V. Zener, argued the cause for appellees Valder, et al.

Jonathan R. Siegel, Attorney, Department of Justice, argued the cause for appellee United States of America. On brief were Frank W. Hunger, Assistant Attorney General, Eric H. Holder, Jr., United States Attorney, and Barbara L. Herwig, Attorney, Department of Justice. Gordon W. Daiger and Robert M. Loeb entered appearances.

Before: EDWARDS, Chief Judge; WALD and HENDERSON, Circuit Judges.

***191** KAREN LECRAFT HENDERSON, Circuit Judge:

Appellant William G. Moore, Jr. (Moore) appeals the dismissal of his Bivens and Federal Tort Claims Act claims against Assistant United States Attorney Joseph B. Valder (Valder), six United States Postal Service Inspectors (postal inspectors) [FN1] and the United States. Moore sued for injuries allegedly caused by Valder's and the postal inspectors' malicious and retaliatory prosecution of him. We affirm in part and reverse in part.

FN1. The postal inspector defendants-appellees are Michael Hartman, Frank Korman, Robert Edwards, Pierce

McIntosh, Daniel Harrington and Norman Robbins.

I.

Moore was indicted in October 1988 on various counts of theft and fraud. Moore was chairman, president and chief executive officer of Recognition Equipment Incorporated (REI), a company interested in supplying the U.S. Postal Service (USPS) with address-scanning equipment. The indictment charged that Moore and Robert Reedy, another REI employee, engaged in a scheme to defraud the federal government by persuading William Spartin to recommend for the position of United States Postmaster General a candidate who favored using REI's address-scanning equipment. Spartin was both president of Gnau & Associates, Inc. (GAI), a consulting firm hired by REI, and president of a subsidiary of an executive search firm hired by the USPS to identify a qualified candidate to serve as Postmaster General. The indictment also accused Moore and Reedy of participating in a scheme by which GAI employees paid money to Peter E. Voss, a member of the USPS Board of Governors, in return for Voss's steering business to GAI and its clients. REI had hired GAI at the suggestion of Voss. Five co-conspirators, including Voss and John R. Gnau, Jr., the principal of GAI, either pleaded guilty or testified about the fraud pursuant to a grant of immunity.

In November 1989, at the close of the government's case in Moore's criminal non-jury trial, the district court granted Moore's motion for a judgment of acquittal. United States v. Recognition Equip. Inc., 725 F.Supp. 587 (D.D.C.1989). The district court found insufficient evidence to support a reasonable inference that Moore and Reedy knew of either scheme. Id. Moore then filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and the postal inspectors, asserting a Bivens [FN2] cause of action for malicious prosecution (malicious prosecution claim) and a Bivens claim for prosecution in retaliation for the exercise of his first amendment right (retaliatory prosecution claim). [FN3] Moore later filed a second complaint in the Northern District of Texas seeking

recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. ss 2671 et seq., for the same alleged injuries.

FN2. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (recognizing a cause of action for damages against officials who violate constitutional or statutory rights under color of federal law).

FN3. The complaint also asserted other constitutional and common-law tort claims which were dismissed by the district court. Moore does not appeal the dismissal of those claims.

In the two complaints Moore alleged that Valder and the postal inspectors maliciously prosecuted him, even though they knew that he was unaware of the fraud, based on his and REI's criticism of USPS procurement policies and on his recommendations to the President of qualified candidates for Postmaster General. In addition, Moore alleged other misconduct, including claims that Valder told several postal inspectors in the presence of a grand jury witness that he did not care whether Moore was in fact guilty because he wanted to secure a "high-profile" indictment to further his career; that Valder and the postal inspectors intimidated and coerced witnesses into changing their testimony to incriminate Moore; that they concealed evidence of Moore's innocence; that they manipulated witness testimony and presented to the grand jury false, incomplete and misleading written witness statements; that they lost, destroyed or concealed from the grand jury exculpatory information; that they disclosed grand jury testimony to third ***192** parties; and that Valder withheld material exculpatory information from Moore after indictment.

The district court dismissed the Bivens claims against Valder, holding that he was protected by absolute immunity. The court denied the postal inspectors' motion to dismiss the Bivens claims against them on the ground of qualified immunity and then transferred the remaining claims to the U.S. District Court for the

District of Columbia, concluding that it lacked in personam jurisdiction. The FTCA complaint was also transferred and the parties stipulated to the consolidation of the two cases by the district court here.

The district court first denied Moore's motion to return the complaints to the Northern District of Texas. The court then dismissed the Bivens claims against the postal inspectors because Moore's complaint did not recite direct evidence of their alleged unconstitutional motive and therefore did not satisfy a heightened pleading standard. The court also dismissed the FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's discretionary function exception.

II.

On appeal Moore contends that Valder is not entitled to absolute immunity; that the court erred in applying a heightened pleading standard to his Bivens complaint; and that the FTCA's discretionary function exception does not preserve the United States's sovereign immunity from liability for the alleged misconduct. In analyzing his claims, we group the specific misconduct alleged by Moore into four categories: pressuring witnesses into incriminating Moore; concealing and distorting exculpatory evidence to create misleading or incomplete witness accounts of what Moore knew about the alleged fraud; [FN4] withholding material exculpatory information from Moore after indictment; and disclosing grand jury testimony to unauthorized third parties.

FN4. We do not read Moore's complaint to allege that Valder or the postal inspectors manufactured false evidence to incriminate Moore. The complaint, construed favorably to Moore, alleges only that the written witness statements, prepared by Valder and the postal inspectors and submitted to the grand jury, created false impressions because they omitted important exculpatory testimony. Joint Appendix (JA) 377-78.

A. Claims Against Valder

[1] The district court dismissed Moore's Bivens claims against Valder, holding that Valder was protected by absolute immunity. [FN5] We review de novo a dismissal for failure to state a claim upon which relief can be granted but accept the facts as alleged in the complaint. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276, 1273 (D.C.Cir.1994). We hold that absolute immunity shields Valder from liability for the decision to prosecute Moore and for some, but not all, of the other alleged instances of misconduct.

FN5. According to the district court, "Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder were prosecutorial functions...." JA 340.

[2] In several decisions the Supreme Court has considered whether and to what extent a state or local prosecutor qua prosecutor is immune from liability under 42 U.S.C. s 1983. As the Court has recognized, the law of immunity in a Bivens claim against a federal official mirrors that in a section 1983 claim against a state official. See, e.g., Butz v. Economou, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909-10, 57 L.Ed.2d 895 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under s 1983 and suits brought directly under the Constitution against federal officials"); see also Briggs v. Goodwin, 569 F.2d 10, 17-18 n. 8 (D.C.Cir.1977) ("[A]ssuming the rule of Bivens comprehends a damage action for a particular constitutional infringement by a federal officer, the federally-determined immunity applicable in such a case should be no different from the federally-determined immunity available in a s 1983 suit against a state official.") (emphasis original). ***193** Accordingly, we look to those decisions for guidance.

In Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court held that a prosecutor enjoys absolute immunity from section 1983 liability when he acts "as an advocate" by engaging in activities "intimately associated with the judicial phase of the criminal process." Id. at 430, 96 S.Ct. at 995. As the Court in Imbler noted, the common law afforded absolute immunity to prosecutors for several reasons. Immunity encourages vigorous decisionmaking by reducing, if not eliminating, liability's inhibitory effect, id. at 424-25, 96 S.Ct. at 992-93; it protects prosecutors against having "to answer in court each time [a defendant] charge [s] him with wrongdoing [which diverts] his energy and attention ... from the pressing duty of enforcing the criminal law," id. at 425, 96 S.Ct. at 992; and it ensures that judges are not influenced "by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." Id. at 427, 96 S.Ct. at 993. Alternative mechanisms, such as the trial judge's remedial powers, appellate review and post-conviction collateral remedies, exist to remedy injury caused by prosecutorial misconduct. Id. In addition, there are alternative ways to deter and punish prosecutorial misconduct, such as subjecting the prosecutor to criminal prosecution or professional discipline. Id. at 429, 96 S.Ct. at 994.

The Court in Imbler held that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under s 1983." Id. at 424, 96 S.Ct. at 992. At a minimum, advocatory conduct includes "initiating a prosecution" and "presenting the State's case." Id. at 431, 96 S.Ct. at 995-96. [FN6] Recognizing that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," the Court acknowledged that distinguishing between action taken as an advocate and action taken as an administrator or investigator "may present difficult questions." Id. at 431 n. 33, 96 S.Ct. at 996 n. 33.

FN6. Additionally, "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present" are advocatory decisions. Imbler, 424 U.S. at 431 n. 33, 96 S.Ct. at 996 n. 33.

The line between advocatory conduct and administrative or investigative activity was refined in Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). Using a "functional approach," the Court emphasized that lower courts must look at the nature of the function performed, not the identity of the person performing it, to determine if a prosecutor is clothed with absolute immunity. The prosecutor must establish that the conduct under review was advocatory in nature. Id. at 486, 111 S.Ct. at 1939. The Court held that participation in a probable cause hearing ("appearing before a judge and presenting evidence in support of a motion for a search warrant") is protected by absolute immunity but giving legal advice to police officers is not. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation- inducing conduct." Id. at 494, 111 S.Ct. at 1943-44. The Court warned that "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." Id. at 495, 111 S.Ct. at 1944.

Most recently, the Court discussed the scope of absolute prosecutorial immunity in Buckley v. Fitzsimmons, --- U.S. ----, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). There, the Court reaffirmed that "as the function test of Imbler recognizes, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." Id. at ----, 113 S.Ct. at 2615. Advocatory conduct protected by absolute immunity

"include[s] the professional evaluation of the ***194** evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Id. But when a prosecutor "performs the investigative functions normally performed by a detective or police officer," he is entitled only to the qualified immunity that the detective or police officer enjoys. Id. at ----, 113 S.Ct. at 2616-17.

In Buckley, the petitioner alleged that the prosecutors fabricated evidence during the preliminary investigation of a crime and made false statements at a press conference announcing the indictment of the petitioner. The Court held that the prosecutors did not have absolute immunity from liability for the alleged fabrication of evidence because they did not have probable cause to arrest or to initiate judicial proceedings. Id. at ----, 113 S.Ct. at 2616. "Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." Id. The Court emphasized that the alleged fabrication occurred before a grand jury was convened and that when the grand jury eventually was convened, "its immediate purpose was to conduct a more thorough investigation of the crime--not to return an indictment against a suspect whom there was already probable cause to arrest." Id. The Court also held that a prosecutor is not absolutely immune from liability for making allegedly false statements to the press because statements to the media "have no functional tie to the judicial process." Id. at ----, 113 S.Ct. at 2618.

[3] Applying these holdings here, we conclude that Valder's prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to prosecute Moore. His prosecutorial immunity also protects Valder from liability for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes. Valder's decisions regarding what evidence to

put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of "initiating a prosecution" and "presenting the State's case." Imbler, 424 U.S. at 431, 96 S.Ct. at 996; see also Hill v. City of New York, 45 F.3d 653, 661-62 (2nd Cir.1995) (holding absolute immunity protects prosecutor from liability for withholding exculpatory evidence from grand jury). In addition, withholding after indictment information that is subject to disclosure under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is advocatory. In Imbler, the prosecutor was alleged to have knowingly used false testimony and suppressed material exculpatory evidence at trial. The Court upheld the lower courts' rulings that the prosecutor was absolutely immune from potential liability for the alleged misconduct. As other courts have recognized, it follows from Imbler that the failure, be it knowing or inadvertent, to disclose material exculpatory evidence before trial also falls within the protection afforded by absolute prosecutorial immunity. See Hill, 45 F.3d at 662 (holding failure to turn over Brady material "after prosecutorial phase" of case had begun was covered by absolute prosecutorial immunity); Carter v. Burch, 34 F.3d 257, 262 (4th Cir.1994) (holding absolute immunity protects prosecutor from liability for failing to give defense counsel materially exculpatory evidence).

[4] Valder, however, has not met his burden of establishing that absolute immunity protects him from potential liability for the other instances of misconduct alleged by Moore. Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution. See, e.g., Barbera v. Smith, 836 F.2d 96, 100 (2d Cir.1987) (holding "acquiring evidence which might be used in a prosecution," in contradistinction to "organization, evaluation, and marshalling " of such evidence, is activity of "police nature" and is therefore not entitled to absolute protection) ***195** (emphasis

original). "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.' " Buckley, --- U.S. at ----, 113 S.Ct. at 2616 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir.1973), cert. denied, 415 U.S. 917, 94 S.Ct. 1413, 1414, 39 L.Ed.2d 471 (1974)). [FN7]

FN7. And as the Supreme Court explained: A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial.... When the functions of prosecutors and detectives are the same ... the immunity that protects them is also the same. Buckley, --- U.S. at ----, 113 S.Ct. at 2617.

[5] Finally, disclosing grand jury testimony to unauthorized third parties is not advocatory because it has no functional tie to the judicial process--it does not contribute to the government's case before a grand or petit jury. Like making statements at a press conference, unauthorized disclosure "does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." Buckley, --- U.S. at ----, 113 S.Ct. at 2618. [FN8]

FN8. While we conclude that absolute immunity does not protect Valder, he of course would be entitled to any qualified immunity available to the postal inspectors. Qualified immunity protects a government official who performs discretionary functions from liability for civil damages if he can show that his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

B. Claims Against the Postal Inspectors

[6] The district court dismissed Moore's claims against the postal inspectors because Moore's complaint did not allege direct evidence that they acted maliciously or in retaliation for constitutionally protected speech. Reviewing the dismissal de novo and taking the facts as alleged in Moore's complaint, Kowal, 16 F.3d at 1276, 1273, we affirm the dismissal of the malicious prosecution claim but hold that the district court erred in dismissing Moore's retaliatory prosecution claim. [FN9]

FN9. As an initial matter, we reject Moore's argument that the district court here was precluded from reconsidering the Texas district judge's conclusion that Moore had "asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief." JA 343- 44. We first observe that the Texas district judge should not have ruled on the immunity issue because he found that he lacked personal jurisdiction over the postal inspectors. More importantly, we iterate that the district court below is bound to follow the law of this circuit. See, e.g., 1B Moore's Federal Practice ("The district courts owe obedience, each to the court of appeals in its own circuit. It may happen, therefore, that a decision in the transferor court is in accordance with the view of the law as established by the court of appeals in its own circuit, but in the transferee circuit the law is either unsettled, or settled to the contrary.... If the issue has been settled ... the transferee court finds itself suspended between the doctrine of stare decisis and the doctrine of the law of the case. In such a circumstance the transferee court would invite reversal if it did not follow the decisions of its own court of appeals.").

[7][8][9] The district court did not address whether Moore's Bivens claims alleged the violation of clearly established law. [FN10] The court, therefore, "erred in deciding the heightened pleading issue before deciding the threshold 'essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.' " Kartseva v. Department of State, 37 F.3d 1524, 1530 (D.C.Cir.1994) (quoting Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)

(emphasis original)). Furthermore, it has not been clearly established that malicious prosecution violates any constitutional or statutory right. [FN11] Accordingly, ***196** the postal inspectors' qualified immunity defeats Moore's malicious prosecution claim. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. Moore's retaliatory prosecution claim, however, does allege the violation of clearly established law. [FN12]

FN10. The parties appear to agree that prosecution in retaliation for speech protected by the first amendment violates a clearly established right. See infra note 12. Although the parties disputed whether the malicious prosecution claim survived the qualified immunity defense, the district court expressly found that it "need not address the question" because of its ruling that Moore's allegations were otherwise deficient. JA 355.

FN11. See Sami v. United States, 617 F.2d 755, 773 (D.C.Cir.1979) (citing with approval cases holding that "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation"); see also McLaughlin v. Alban, 775 F.2d 389, 392 (D.C.Cir.1985) (concluding that plaintiff must "show not merely a mistaken prosecution or even a common law tort, but the violation of a constitutional right" to establish section 1983 claim); Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404, 409 (1st Cir.1990) (holding section 1983 provides remedy only if plaintiff proves elements of malicious prosecution under state law and establishes that misuse of the legal proceedings was so egregious that he suffered deprivation of rights secured by fourteenth amendment) (citations omitted).

FN12. See, e.g., Haynesworth v. Miller, 820 F.2d 1245, 1255-57 (D.C.Cir.1987) (agreeing that "retaliatory prosecution [allegedly initiated solely because plaintiff refused to release civil claims of police misconduct against arresting officers] constitutes actionable First Amendment wrong"); see also Norwell v. Cincinnati, 414 U.S. 14, 16, 94 S.Ct. 187, 188, 38 L.Ed.2d 170 (1973) (per curiam) (finding first amendment violation in

retaliatory prosecution for "nonprovocatively voicing [ ] objection" to police conduct); DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir.1990) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under s 1983 even if the act, when taken for a different reason, would have been proper.") (quoting Matzker v. Herr, 748 F.2d 1142, 1150 (7th Cir.1984)); Magnotti v. Kuntz, 918 F.2d 364, 368 (2d Cir.1990) ("It is undisputed that retaliatory prosecution may expose a state official to section 1983 damages."); Losch v. Parkesburg, 736 F.2d 903, 907-08 (3d Cir.1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under s 1983.") (citing Wilson v. Thompson, 593 F.2d 1375, 1377 (5th Cir.1979)).

In publicly criticizing the USPS Moore unquestionably exercised his first amendment rights. Record evidence manifests that the criticism produced hostility in USPS management. Joint Appendix (JA) 154-156, 283. Two of the postal inspectors, who reported to USPS management, heard and did not repudiate Valder's declaration that Moore's innocence was irrelevant to the prosecution he intended to pursue. JA 32. These facts taken together constitute evidence sufficient to meet any applicable heightened pleading standard [FN13] and, accordingly, we remand Moore's retaliatory prosecution claim against the postal inspectors.

FN13. In Kartseva v. Department of State, 37 F.3d 1524, 1530-31 (D.C.Cir.1994), we explained this circuit's two-level heightened pleading standard.

C. Claims Against the United States

The district court dismissed Moore's FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's "discretionary function" exception. We review the dismissal de novo but construe Moore's allegations in his favor. Hohri v. United States, 782 F.2d 227, 241 (D.C.Cir.1986), vacated on other grounds, 482 U.S. 64 (1987). [FN14] We hold that only some of the alleged misconduct is

covered by the exception.

FN14. Because we accept Moore's version of the facts, we reject his argument that the district court should not have decided whether the discretionary function exception applied without permitting Moore an opportunity to conduct discovery and develop a "concrete record."

[10] The FTCA waives the sovereign immunity of the United States from suits for negligent or wrongful acts of government employees subject to certain exceptions. See 28 U.S.C. ss 2671-2680. The "discretionary function" exception protects the federal government from liability for "[a]ny claim based upon ... the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. s 2680(a). The exception "preserves the preexisting cloak of governmental immunity for some category of activities." Gray v. Bell, 712 F.2d 490, 508 (D.C.Cir.1983), cert. denied, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984). We "must examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." Id. at 515. But where the "allegation of improper investigatory conduct is inextricably tied to the decision to ***197** prosecute and the presentation of evidence to the Grand Jury," the discretionary function applies and preserves governmental immunity. Id. at 516.

[11][12][13] Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is "exculpatory" and "material" and therefore must be disclosed pursuant to a Brady request [FN15] are actions that require the prosecutor to exercise his professional judgment. They are therefore quintessentially discretionary. [FN16] Accordingly, the

United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment.

FN15. We recognize that internal regulations of the Department of Justice direct that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." Department of Justice Manual, 9-11.233 (October 1, 1990). Putting aside the question whether this regulation creates any enforceable right, we note that deciding what this regulation requires under a specific set of circumstances is itself a discretionary act.

FN16. We are guided by our decision in Gray where we held that allegations that the defendants "deliberately present[ed] false and misleading evidence to and with[held] exculpatory evidence from the Grand Jury" are within the discretionary function exception because they are "insufficiently separable from the discretionary decision to initiate prosecution." 712 F.2d at 495, 516.

[14] Disclosing grand jury testimony to unauthorized third parties, however, is not a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion. Rather, it is a discrete activity, sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable to this allegation. We express no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence.

We therefore affirm in part, reverse in part and remand to

the district court for proceedings consistent with this opinion.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR., et al., Plaintiffs,	
v.	Civil Action No. 92-2288 (N.J.)
MICHAEL HARTMAN, et al., Defendants	
WILLIAM G. MOORE, JR et al. Plaintiffs,	
v.	Civil Action No. 93-0324 (N.J.)
UNITED STATES OF AMERICA, Defendant.	

ORDER

For the reasons set forth in the memorandum opinion issued on this date, it is this /s/ 24th day of September, 1993,

ORDERED that the motions of the United States to dismiss for lack of jurisdiction in Civil No. 92-2288 and in Civil No. 93-0324 be, and hereby are, granted; it is further

ORDERED that the motion of the Inspector Defendants to dismiss in Civil No. 92-2288 be, and hereby is granted; it is further

ORDERED that all other pending motions in these consolidated cases be, and hereby are, denied as moot; and it is

further

ORDERED that these consolidated cases be, and hereby are, dismissed.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR., et al., Plaintiffs,	
v.	Civil Action No. 92-2288 (N.J.)
MICHAEL HARTMAN, et al., Defendants.	

WILLIAM G. MOORE, JR et al. Plaintiffs,	
v.	Civil Action No. 93-0324 (N.J.)
UNITED STATES OF AMERICA, Defendant.	

MEMORANDUM OPINION

These two actions against the United States arise from a major criminal investigation and subsequent prosecution carried out by the office of the United States Attorney for the District of Columbia. The plaintiffs allege that the government and its agents intentionally misled a grand jury, concealed exculpatory evidence, intimidated witnesses, and falsified

statements in an attempt to convict plaintiff William Moore. The United States has filed motions to dismiss in both cases.

BACKGROUND

In ruling on a motion to dismiss, the Court must treat the allegations of the complaint as true. Shear v. National Rifle Ass'n, 606 F.2d 1251, 1253 (D.C. cir. 1979). The facts as set forth in the complaints are as follows: in early 1985, the U.S. Postal Inspection service began an investigation into possible illegal payments from John Gnau, a consultant, to Peter Voss, then a member of the United States Postal Service Board of Governors. Assistant United States Attorney Joseph Valder eventually came to lead the investigation. Voss, Gnau, and another member of Gnau's consulting firm pled guilty to criminal charges, while other participants in the conspiracy agreed to cooperate in exchange for immunity from prosecution. Compl. (Civil No. 93-0324) at 6-7.

Plaintiff William Moore was at this time chief executive officer of Recognition Equipment, Inc. ("REI"), a corporation that was seeking to obtain a contract with the Postal Service for the sale of multiple-line optical character recognition ("MLOCR") equipment. At the suggestion of Governor Voss, REI had retained Gnau's consulting firm in order to improve REI's chances of obtaining the contract with the Postal Service. Id. As the investigation of Voss and Gnau progressed, Valder and the Postal Inspectors allegedly tried to find a way to link Moore to the conspiracy. However, the evidence clearly demonstrated that Moore knew nothing of the conspiracy. In fact, several conspirators told Valder and the Inspectors that they had actively sought to conceal the conspiracy from Moore. Id. at 7.

Nevertheless, Valder and the Inspectors allegedly "engaged in unusual, unlawful and unconstitutional investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted." Id. at 8. Valder and the Inspectors are alleged to

have presented incomplete witness statements to the grand jury, even though the witnesses themselves had said that the statements were inaccurate. Valder and the Inspectors are alleged to have intimidated witnesses, going so far as to tear up the immunity letter of one witness in his presence while threatening to prosecute his son. Moore also claims that the defendants failed to provide him with exculpatory evidence that should have been disclosed under Brady v. Maryland, 373 U.S. 83 (1963), evidence including the report of a lie detector test and a witness statement containing exculpatory statements.

On October 6, 1988, a federal grand jury in the District of Columbia issued an indictment naming Moore, REI, and Robert Reedy, an employee of REI. The indictment charged the defendants with one count of conspiracy to defraud the United States, 18 U.S.C. § 371; one count of theft, 18 U.S.C. §§ 2, 1707; one count of receiving stolen property, D.C. Code Ann. §§ 22-3832(a), (c)(1), 22-105; two counts of mail fraud, 18 U.S.C. §§ 2, 1341; and two counts of wire fraud, 18 U.S.C. §§ 2, 1343. The substance of the charges was that the defendants had illegally conspired to influence the Postal Service's decision whether to award a contract to REI. According to the indictment, REI, Moore, and Reedy paid Gnau for lobbying services, and Gnau in turn paid Governor Voss to take illegal actions on REI's behalf. The indictment also alleged that the defendants had hatched a scheme to replace then Postmaster General Paul Carlin with a person more sympathetic to REI's interests.

The government presented its case during a six-week bench trial before the Honorable George Revercomb of the United States District Court for the District of Columbia. On November 20, 1989, following the close of the government's evidence, Judge Revercomb granted the defendants' motion for judgment of acquittal on all charges. See United States v. Recognition Equipment. Inc., 725 F. Supp. 587 (D.D.C. 1989). In his opinion, Judge Revercomb specifically noted that "no evidence has been presented that REI, Moore, or Reedy knew of this criminal scheme." Id. at 590. Nevertheless, as a result of his indictment

and prosecution, Moore maintains that his career was seriously compromised and his finances decimated. He was twice fingerprinted and processed by law enforcement officers and briefly jailed. He and his wife allege that they suffered humiliation, physical and mental suffering, and anguish, which required them to undergo medical treatment.

PROCEDURAL HISTORY

A. Civil Action No. 92-2288

On November 19, 1991, Moore and his wife, Blanche K. Moore, filed a complaint in the United States District Court for the Northern District of Texas against Valder and the seven Postal Inspectors who investigated the case against Moore. The complaint sought to recover for various constitutional violations under a Bivens theory of liability, [1] as well as for the state common-law torts of slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution. In response to the assertion of state law claims against Valder and the Inspectors, the Attorney General's designee certified, on February 18, 1992, that all of the claims against the individually named government defendants arose from actions carried out within the scope of their employment. The Texas federal district court then ordered that the United States was to be substituted as the defendant with respect to the state law claims pursuant to 28 U.S.C. § 2679(d)(1). The state law claims against the individual defendants were dismissed with prejudice.

On September 21, 1992, the Texas federal district court issued an order ruling on the defendants' motion to dismiss. The order dismissed all constitutional claims brought by Blanche Moore, all of Moore's constitutional claims against Valder, and

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[1] See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

several of Moore's constitutional claims against the Inspectors. The Texas court refused, however, to grant the defendants' motion to dismiss with respect to Moore's malicious prosecution claim against the Inspectors, as well as the constitutional claim alleging violation of his First Amendment rights. Moreover, the court also concluded that it lacked personal jurisdiction over the Inspectors and transferred the case rather than dismiss the remaining claims against them. On October 5, 1992, the official record was transferred to this court and docketed as Civil Action No. 92-2288. The defendants moved to dismiss for lack of jurisdiction, to dismiss the Inspectors as defendants, and to vacate the portion of the Texas district court's ruling that permitted claims to go forward against the Inspectors. A motion for entry of default judgment against the United states was also filed.

B. Civil Action No. 93-0324

On October 14, 1992, the plaintiffs filed a second lawsuit in the United states District Court for the Northern District of Texas. This second complaint named only the United States as a defendant, and differed from the first primarily in that (1) it alleged exhaustion of the administrative remedy procedure which is a prerequisite to filing suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, and (2) it alleged no cause of action for defamation or for invasion of privacy. On February 16, 1993, the official record was formally transferred to this court, where it was docketed as Civil Action No. 93-0324. The United States has filed a motion to dismiss for lack of subject matter jurisdiction.

DISCUSSION

A. The Bivens Claims Against the Inspectors Do Not Satisfy This Circuit's Heightened Pleading Standard

In ruling on the defendants' motion to dismiss in Civil No. 92-2288, the Texas federal district court declined to dismiss

two claims that Moore had brought against the Inspector defendants in their individual capacities: (1) the malicious prosecution claim, and (2) the claim that the Inspectors had violated Moore's First Amendment rights. The defendants argue that these claims should be dismissed because Moore has failed to allege them with sufficient particularity to satisfy this circuit's heightened pleading standard in Bivens actions.[2]

The Supreme Court has determined that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). To this end, the Court of Appeals for this Circuit has developed a heightened pleading standard for Bivens claims alleging an unconstitutional motive. A Bivens plaintiff may not merely "allege facts consistent with lawful conduct and append a claim of unconstitutional motive," because to permit such a lawsuit to proceed would "impos[e] on officials the very costs and burdens of discovery and trial that Harlow intended to spare them." Siegert v. Gilley, 895 F.2d 797, 801 (D.C. cir. 1990), aff'd on other grounds, 111 S. Ct. 1789 (1991). Instead,

> Where the defendant's subjective intent is an essential

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[2]The parties also dispute whether a malicious prosecution claim can rise to the level of a constitutional tort. Normally it does not: "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation." Sami v. United States, 617 F.2d 755, 773 (D.C. Cir. 1979). Yet if, as Moore argues, his malicious prosecution count does indeed allege a constitutional violation, then his allegations of malice must still meet this circuit's heightened pleading standard for Bivens actions. Because the Court has determined that Moore's allegations of malice do not meet this standard, the Court need not address the question of whether his malicious prosecution claim states a cause of action under the Constitution.

> component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425, 1435 (D.C. Cir. 1987). To survive the Inspectors' motion to dismiss, therefore, Moore must produce direct evidence showing that the Inspectors acted out of
malice. Evidence that merely supports an inference of malice is insufficient.

According to Moore, "[t]he Complaint alleges that the prosecution against Moore was initiated for at least two reasons. First, Moore was being punished for his aggressive lobbying of the USPS and important members of congress in order to persuade the USPS to adopt REI's MLOCR technology . . . . Second, . . . [they] sought to prosecute Moore for suggesting qualified candidates for the position of Postmaster General." Pls.' Opp'n to Inspectors' Mot. to Dismiss at 17. Moore claims to have offered some six sources of direct evidence to support these allegations: (1) the complaint itself, (2) the indictment in Moore's criminal case, (3) the testimony of Frank Bray at Moore's criminal trial, (4) Judge Revercomb's opinion entering a judgment of acquittal, (5) Moore's own affidavit, and (6) an affidavit executed by William Hittinger, a member of REI's board of directors.

The first five of these sources provide only inferential proof of malice. The complaint, for example, alleges that Moore lobbied congress and the Postal Service and that he recommended a candidate for the position of Postmaster General. Its strongest

allegation of malicious intent, however, is contained in paragraph 16, which alleges that the defendants used unlawful investigative techniques

> with malice and in clear violation of Moore's right to a fair investigation; these activities were done by defendants in an attempt to obtain publicity for themselves and seek career advancement; and these unlawful activities were done by defendants in an attempt to "punish" Moore for exercising his constitutionally-protected rights to criticize USPS procurement decisions.

Compl. at 9. This allegation is insufficient under Martin because it does not identify facts that would be direct evidence of malicious intent. Such direct evidence might include, for example, specific statements or documents that expressly set forth the defendants' intent. See e.a., Hobson v. Wilson, 737 F.2d 1, 10 (D.C. Cir. 1984) (complaint referred to specific memoranda admitting that defendants' express purpose was to disrupt plaintiffs' political activities), cert. denied, 470 U.S. 1084 (1985); see also Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th cir. 1990) (defining "direct evidence" as "evidence which, if believed, would prove the existence of a fact in issue without inference or presumption"). Because the complaint does not contain such evidence or offers of proof, it cannot serve to overcome a qualified immunity defense.

Nor do the indictment or Judge Revercomb's opinion advance Moore's case. These documents confirm that Moore lobbied Congress and the Postal Service, but they do not provide direct evidence that he was prosecuted because of his lobbying activities. Bray's testimony and Moore's own affidavit go one step further; they show that animosity existed between some REI employees and some employees of the Postal Service. Bray, for example, testified at trial that there was a "stubborn resistance" at the Postal Service to REI'S attempts to promote MLOCR technology, and said he worried that Moore's aggressive lobbying

effort . . might alienate the feelings" of some Post Office leaders. Trial Tr. (Ex. E to Appendix to Pls.' Opp'n to Mot. to Dismiss, filed Apr. 14, 1992) at 1718, 1731. According to Moore, the Postal Service had a "personal animus" against him and seemed "determined to exact . . . punitive measures directed at me personally." Aff. of William G. Moore (Ex. B to Appendix to Pls.' Opp to Mot. to Dismiss, filed Apr. 14, 1992) at 29-30. Even these statements do not, however, show that this alleged animosity was a motivating factor in the Inspectors' decision to investigate and prosecute Moore. The closest they come is Moore's statement that "I believe that the agents were motivated in large measure by animus towards me and my company born of longstanding conflict between [REI] and various senior managers within the USPS." Id. at 1. This sweeping claim relies entirely upon Moore's subjective beliefs and refers to no direct or circumstantial evidence of the defendants' intent. This claim therefore cannot serve to meet the required heightened pleading standard for Bivens actions.

Indeed, the only direct evidence of intent that Moore has offered is the Hittinger affidavit. In this affidavit, a member of REI's board of directors describes how he traveled to Washington in 1987 or 1988 in order to testify before a grand jury and had lunch with Valder and two Postal Inspectors on the day of his testimony. During their conversation, "Mr. Valder stated in substance that the merits of the case or whether the persons involved were guilty or not did not concern him. He explained that it was important to him that he win the case because he wanted to get a track record or some notoriety which would help him obtain a good position in private practice." Aff. of William C. Hittinger (Ex. B to Pls.' Opp'n to Mot. to Dismiss, filed Mar. 5, 1993) at 3. Even this direct evidence, however, cannot save Moore's claims against the Inspectors from dismissal for it provides no evidence of the Inspectors' intent. Nothing in the affidavit suggests that the Inspectors shared Valder's alleged motivations.

Moore has completely failed to offer any direct evidence

of malicious intent by the Inspectors. Moore has urged the Court to adopt a less stringent reading of the heightened pleading standard, i.e., a reading set forth in Kimberlin v. Quinlan, 774 F. Supp. 1 (D.D.C. 1991), appeal filed, No. 91-5315 (D.C. Cir. Aug. 30, 1991). Kimberlin involved a federal prisoner who alleged that prison officials had placed him in detention to keep him from speaking to the news media about his claims that he had sold marijuana to vice-presidential candidate Dan Quayle. The trial judge in Kimberlin examined Siegert and other cases dealing with the heightened pleading standard and concluded that "Siegert does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions." He then held that the Bivens plaintiff did not have to allege direct evidence of intent but could instead survive' dismissal with "tangible allegations of concrete facts corroborative of his own subjective version of the events." Id. at 6. Moore argues that under this standard his case should proceed to discovery, because he has alleged facts which "raise[] a legitimate inference that someone was out to 'get' Bill Moore." Pls.' Opp'n to Inspectors' Mot. to Dismiss at 19.

The Court declines to follow Kimberlin. Moore's allegations, by contrast to those in Kimberlin, rely upon questionable logic and create no strong inferences of unconstitutional motive. The chain of inferences Moore has constructed can be summarized as follows: (l) Moore suggested candidates for the office of Postmaster General, (2) he lobbied congress and the Postal Service to adopt MLOCR technology, (3) his efforts angered some officials at the Postal Service, and (4) Valder and the Inspectors attempted to silence him by pursuing an unwarranted prosecution. Although this scenario is within the realm of possibility, it essentially relies upon a post hoc ergo propter hoc theory of causation -- because the lobbying came before the prosecution, the lobbying must have caused the prosecution. Moore is unable to explain why the Inspectors would have cared about a private citizen's criticism of Postal Service procurement procedures. Nor does he reveal why the Inspectors

would have preferred that the Postal Service use single-line optical character recognition equipment instead of REI'S multiple-line equipment. In Kimberlin's, by contrast, the defendants were high-ranking executive branch officials, appointed during Republican administrations, who might naturally have been intensely interested in the outcome of a presidential election. Indeed, Kimberlin showed that the defendants were in close contact with the Quayle campaign, and that their high-level decision to place a single inmate in detention was unprecedented and extraordinary. The court rightly concluded that Kimberlin's allegations were "tangible, detailed, and nonconclusory." 774 F. Supp. at 8. Moore, however, alleges only that the postal service bore him animosity and then asks that an inference be drawn that this animosity caused his prosecution. This link is far too tenuous to satisfy even the standard set forth in Kimberlin.

Finally, Moore objects to this Court's review of the Texas court's order which held that Moore had met his pleading burden on his claims against the Inspectors. That order denied the defendants' motion to dismiss the claims, and declared that "[d]iscovery should therefore proceed on both of these claims." Mem. Ord. of Sept 21, 1992 at 10-11. The Court must review this earlier order, however, because the heightened pleading standard for Bivens actions in this Circuit is markedly different from the standard in the Fifth Circuit. Compare Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425, 1435 (D.C. Cir. 1987) (requiring "direct evidence" of malice) with Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985) (requiring only that a plaintiff "alleg[e] with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained."). Furthermore, the Court notes that revision of the Texas court's decision is entirely proper. See lB James W. Moore et al., Moore's Federal Practice ¶ 0.4O4 [4.-l] at 11-9 to -10 (1993) ("[T]here are innumerable . . . orders and rulings that the district court may make as a case moves from the filing of the complaint to trial and judgment. All of these decisions are interlocutory in character, and remain subject to reconsideration

and change at any time until the entry of judgment."); cf. Fed. R. Civ. P. 54(b) (providing, as to multiple claim or multiple party cases, that "[i]n the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"). The Texas court did find that it lacked personal jurisdiction over the Inspectors. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."). The Court will accordingly vacate the portion of the Texas court's order that permitted discovery to proceed against the Inspectors and will dismiss the complaint against the Inspectors in Civil No. 92-2288 because Moore has failed to meet the heightened pleading standard for Bivens actions.

C. The United States Has Not Waived Its Sovereign Immunity with Respect to Constitutional Torts

Because the Inspectors are the only remaining individual defendants in these two lawsuits, after their dismissal only the claims of Moore and his wife against the United States survive. In Civil No. 92-2288, these claims are limited to the plaintiffs' common law claims for slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution. In Civil No. 93-0324, however, the plaintiffs seek recovery for both common law torts and alleged constitutional violations. Counts I, II, and III of the complaint in Civil No. 93-0324 seek damages for malicious prosecution, false arrest, and abuse of process. Counts IV, V, and VI of the complaint seek damages for violations of the First and Fifth Amendments to the United States Constitution.

The FTCA, however, exposes the United States to liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Courts have interpreted this phrase to mean that only claims brought under state law are cognizable under the FTCA. See, e.g., Meyer v. Fidelity Sav., 944 F.2d 562, 568 (9th Cir. 1991) ("Because 'the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act.'"). The Court will accordingly dismiss counts IV, V, and VI of the complaint in civil No. 93-0324, because these counts state constitutional causes of action to which the United States has not waived its sovereign immunity.

C. The Claims Against the United States Are Barred by the Discretionary Function Exception to the Federal Tort Claims Act

The only claims remaining, therefore, are the common law causes of action against the United States. Both lawsuits seek relief on substantially the same grounds; the only difference is that civil No. 93-0324 alleges satisfaction of the administrative remedy procedure under the FTCA, while Civil No. 92-2288 does not.[3] These grounds, as summarized by the plaintiffs themselves, are allegations that the government

1. Knowingly concealed evidence that Moore lacked knowledge of the conspiracy;
2. Presented false, incomplete, and misleading

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[3]Failure to exhaust this procedure provides an alternative ground for dismissal of Civil No. 92-2288. See Mittleman v. United States Treasury, 773 F. Supp. 442, 454 (D.D.C. 1991). Because the claims in the two cases are virtually identical, however, the Court devotes most of its analysis to the discretionary function exception, which applies to both cases.

witness statements to the grand jury;

3. Refused to allow witnesses to amend these misleading statements after the witnesses pointed out that the statements were inaccurate;
4. Intimidated and harassed witnesses;
5. Falsified records of witness interviews by excluding exculpatory material from them; and
6. Withheld and possibly destroyed exculpatory evidence that should have been disclosed to Moore under Brady v. Maryland, 373 U.S. 83 (1963).

See Pls.' Opp'n to Mot. to Dismiss at 7-8. The government contends that claims arising from these actions are barred by the discretionary function exception to the FTCA.

The FTCA waives the United States' sovereign immunity from suits for negligent or wrongful acts of Government employees, subject to certain exceptions set forth in 28 U.S.C. § 2680. The "discretionary function" exception provides that the government is not liable for

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. § 2680(a). In Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984), the court held that decisions to initiate prosecution are quintessential examples of governmental discretion" and are therefore immune under this exception. Id. at 513. With respect to allegations of illegal pre-indictment conduct, courts are cautioned to "examine carefully the allegations made to

determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." Id. at 515. Although the plaintiffs seek to recover for many alleged instances of misconduct, their claims fall into three categories: (1) those relating to the presentation of evidence to the grand jury, (2) those claiming that the government failed to disclose Brady material, and (3) those alleging that the government harassed and intimidated witnesses. Each of these actions, however, is closely linked to the exercise of prosecutorial discretion.

The court in Gray expressly identified "the presentation of evidence to the Grand Jury" as involving the sort of "purely discretionary decisions" that § 2680(a) was intended to protect. 712 F.2d at 515-16. The plaintiffs claim, nevertheless, that the government should be held liable for failing to present exculpatory evidence to the grand jury.[4] The Court notes first that in United States v. Williams, 112 S. Ct. 1735, 1744-46 (1992), the Supreme Court held that the government is under no duty whatsoever to present exculpatory evidence to a grand jury. In deciding Williams the Court overruled a number of contrary holdings by other federal courts, including Judge Revercomb's declaration, in Moore's criminal case, that a prosecutor may not "hide evidence that clearly negates guilt from the grand jury." United States v. Recognition Equipment, Inc., 711 F. Supp. 1, 12 (D.D.C. 1989).

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[4]The plaintiffs also allege that the government "falsified" evidence. Pls.' Opp'n to Mot. to Dismiss at 8. A review of the complaint, however, shows that this alleged falsification did not involve the actual fabrication of evidence, but instead merely refers to the government's failure to include exculpatory evidence in witnesses' statements -- the same conduct of which the plaintiffs complain elsewhere. Thus, all of the plaintiffs' claims relating to the presentation of evidence implicate the prosecutor's discretion to determine what evidence is exculpatory and what evidence is not.

More relevant to our inquiry here, however, is the nature of a prosecutor's determination that a given item of evidence is exculpatory." Judge Revercomb also observed that if prosecutors were forced to justify all their evidentiary decisions, "nearly every indictment would be vulnerable to charges that the prosecutor failed to submit each and every scrap of evidence, circumstantial or direct, that arguably could have worked in favor of the defendant." Id. at 11-12. This is precisely the sort of conduct that the discretionary function exception to the FTCA was intended to prevent. Exculpatory evidence does not come labeled as such. Instead, the decision whether to submit evidence to a grand jury on the grounds that it is "exculpatory" calls invariably for an exercise of discretionary judgment rooted in policy concerns. Such decisions are therefore inextricably "intertwined with purely discretionary decisions of the prosecutors," Gray 712 F.2d at 515, and cannot form the basis of a cause of action against the United States.[5]

The plaintiffs' claim that the government should be held liable for failing to disclose Brady material must be rejected for the same reason. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that a prosecutor has a duty to disclose, upon request, all exculpatory evidence which is material either to guilt

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[5]The plaintiffs argue that the decision whether to disclose exculpatory evidence was not discretionary because the United States Attornevs' Manual states that a "prosecutor must . . . disclose such evidence to the grand jury." The plaintiffs argue that this creates a mandatory duty, and that the discretionary function exception therefore does not apply. See Berkovitz v. United States, 486 U.S. 531, 536 (1988). This argument, however, ignores the plain declaration in the Manual itself that the Manual "provides only internal Department of Justice guidance" and "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." See Appendix A to Defs.' Reply.

or to punishment. although courts have reviewed evidence in the criminal context to determine whether it falls within the scope of Brady, this does not mean that they can or should do so in the context of a civil tort action. No mechanical formula exists for determining whether evidence is exculpatory. Government agents would be hampered in their decision making if the government could be held liable because they made a faulty "judgment call." Congress created the discretionary function exception in recognition of this fact.

Finally, the plaintiffs' allegation that the government "intimidated and harassed witnesses" also implicates actions that are closely linked to prosecutorial discretion. The conduct to which the plaintiffs refer here is the government's alleged attempt to "coerce incriminating testimony" from a witness by tearing up his immunity letter in front of his face and by threatening to prosecute his son. See Compl. (Civil No. 93-0324) at 10-11. In Gray, however, the Court of Appeals established that "(p)rosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception." 712 F.2d at 513. To hold the government liable because it threatened to prosecute a witness's son would be to second-guess its decision about "whether, when and against whom to initiate prosecution," a decision that is clearly committed to its sole discretion. Similarly, the decision whether to grant or deny immunity to a witness is also closely linked to the decision whether to prosecute that witness. Whether these decisions were made with malicious intent is irrelevant, as § 2680 (a) preserves the government's sovereign immunity "whether or not the discretion involved be abused. Thus, neither of these actions can support a claim for damages against the United states.[6]

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[6]The plaintiffs also argue that Gray does not apply to the Postal Inspectors' actions independent of the actions of prosecutor Valder. See Pls.' Opp'n to Mot. to Dismiss at 19-

The discretionary function exception thus exempts the United States from liability for all the common law claims alleged in both of the plaintiff's lawsuits. Having concluded that the Bivens claims against the Inspectors and the constitutional claims against the United States must also be dismissed, the Court will accordingly enter an order dismissing both Civil No. 92-2288 and Civil No. 93-0324. All other pending motions in this case will be denied as moot. An appropriate order will issue.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Date: /s/ September 24, 1993

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21. The relevant inquiry, however, is not which federal official carries out a given action, but whether the action implicates a discretionary function. Furthermore, Gray clearly provides that the discretionary function exception applies "no matter whether the challenged decisions are made during the investigation or prosecution of offenses." 712 F.2d at 516.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM G. MOORE, JR., et al., Plaintiffs,	
	Civil Action No. 3:91-CV-2491-G
v	
JOSEPH B. VALDER, et al., Defendants.	

MEMORANDUM ORDER

Before the court is the motion of defendants Joseph B. Valder ("Valder"), Michael Hartman ("Hartman"), Frank Korman ("Korman"), Robert Edwards ("Edwards"), Pierce McIntosh ("McIntosh"), Daniel Harrington ("Harrington"), Norman Robbins ("Robbins"), other unnamed defendants, and the United States of America ("the government") (collectively "defendants") to dismiss the complaint of plaintiffs William G. Moore, Jr. ("Moore") and Blanche K. Moore ("Mrs. Moore") (collectively "plaintiffs") for failure to state a claim upon which relief can be granted, lack of personal jurisdiction, and improper venue. For the reasons stated below, the motion to dismiss all constitutional claims brought by Mrs. Moore against the defendants is granted: the motion to dismiss Moore's constitutional claims against Valder is granted; the motion to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, Macintosh, Harrington, Robbins and other unnamed defendants is granted as to the fifth amendment/fair and impartial grand jury claim, but is denied as to the malicious prosecution and first

amendment claims; and while there is merit in the motion to dismiss for lack of personal jurisdiction those claims which remain in the case, the court has elected to transfer, rather than dismiss, those claims.[1]

I. BACKGROUND

On November 19, 1991, the plaintiffs sued the defendants -- an Assistant United States Attorney (Valder) and a number of present and former employees of the United States Postal Service (Hartman, Korman, Edwards, Macintosh, Harrington, Robbins and other unnamed defendants) -- for $30 million in damages allegedly caused by their misconduct during the criminal investigation, and subsequent prosecution, of Moore -- formerly the Chairman, President, and Chief Executive Officer of Recognition Equipment Incorporated.[2] Plaintiffs contend that the defendants engaged in a pattern of tactics designed to mislead and abuse the grand jury process and to deprive both of them of constitutional rights.

A complaint need only recite a short and plain statement

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[1]Plaintiffs' common law claims against the individual defendants for slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution were dismissed with prejudice and are now being brought solely against the United States, as contemplated by 28 U.S.C. § 2679 (d) (1). Moore v. Valder, et al., 3-92-CV-2491-G (N.D. Tex. June 29, 1992) order granting substitution of United States for individual defendants as to common law claims). The motion at issue here did not address these claims against the United States, and this court accordingly intimates no opinion concerning them. They will be transferred, however, to the District of Columbia so that all remaining claims may be adjudicated in one forum.

[2]*See United States v. Recognition Equipment, Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a) the Federal Rules of Civil Procedure do not require factual pleading; plaintiffs may proffer general pleadings and defendants may discover the precise factual basis for the claims through liberal pretrial discovery procedures. *Morrison v. City of Baton Rouge,* 761 F.2d 242, 244 (5th Cir. 1985). A motion under Rule 12(b)(6) should be granted, however, only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Campbell v. Wells Fargo Bank, N.A.,* 781 F.2d 440, 442 (5th Cir.), cert. denied, 476 U.S. 1159 (1986); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded facts in the complaint and construe the complaint liberally in favor of the plaintiffs. *Abdul-Alim Amin v. Universal Life Insurance Company of Memphis Tennessee,* 706 F.2d 638, 640 (5th Cir. 1983). The court should also give the plaintiffs an opportunity to amend their complaint rather than dismiss if it appears that a more carefully drafted complaint might state a claim upon which relief may be granted. *Friedlander v. Nims,* 755 F.2d 810, 813 (11thCir. 1985). *See also Dussouy v. Gulf Coast Investment Corporation,* 660 F.2d 594, 604 (5th Cir. 1981); *Sarter v. Mays,* 491 F.2d 675, 676 (5th Cir. 1974).

The court need not, however, assume facts that the plaintiffs have failed to allege. *Campbell,* above, 781 F.2d at 443. Nor must the court accept as true allegations which are wholly conclusory or which fail to set forth facts that, if proved, would warrant the relief sought. Dismissal of claims founded on such allegations is proper. *Davidson v. State of Georgia,* 622 F.2d 895, 897 (5th Cir. 1980).

II. Standing of Mrs. Moore

As a preliminary matter, the court agrees with the defendants that Mrs. Moore lacks standing to assert constitutional

claims against them under the first and fifth amendments.[3] The Supreme Court has consistently held that rights under the first, fourth and fifth amendments are personal and may not be vicariously asserted. *See, e.g., Rakas v. Illinois,* 439 U.S. 128, 133-34 (1978) (Fourth amendment); *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973) (first amendment); *United States v. White,*322 U.S. 694, 698 (1944) (fifth amendment). In response to the defendants' assertions, the plaintiffs present merely conclusory allegations -- offering neither case law to refute the defendants' arguments nor facts to demonstrate that the government violated Mrs. Moore's constitutional rights. Because Mrs. Moore lacks standing, her constitutional claims must be dismissed.

III. Immunity of Defendants

A. Valder

The plaintiffs allege that Valder, in his capacity as an assistant U.S. attorney conducting a criminal investigation and subsequent prosecution, violated Moore's constitutional rights under the first and fifth amendments of the U.S. Constitution. A prosecutor enjoys absolute immunity from personal liability for his conduct "in initiating a prosection and in presenting the [Government's] case." *Imbler v. Pachtman,* 424 U.S. 409, 431 (1976). Where the actions giving rise to the claim for damages involve the prosecutor's role as an advocate, the prosecutor is immune from suit. *See Burns v. Reed,* __ U.S. __. __, 111 S.Ct. 1934, 1942 (1991); *Imbler,* 424 U.S. at 430-431. Absolute

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[3]Plaintiffs also alleged a fourth amendment claim, but they failed to respond to defendants' motion to dismiss that claim. Because the court is persuaded by defendants' arguments that the fourth amendment claim should be dismissed, and because plaintiff's failure to respond may fairly be deemed an abandonment of that claim, this opinion will discuss only plaintiff's first and fifth amendment claims.

immunity extends to the conduct of prosecutors in presenting cases to grand juries. *Morrison v. City of Baton Rouge,* above, 761 F.2d at 246-49. Activity prior to the presentation of a case to the grand jury, including the interviewing of witnesses who will testify before the grand jury, is advocatory in nature, and as such, is immunized from suit. *See Morrison,* above, 761 F.2d at 248; *Cook v. Houston Post,* 616 F.2d 791, 793 (5th Cir. 1980). Even prosecutorial misconduct committed *maliciously or in bad faith* is protected by absolute immunity. *See, e.g., Brummett v. Camble,* 946 F.2d 1178, 1181 (5th Cir. 1991), *cert denied,* __ U.S. __, 112 S.Ct. 2323 (1992); *Morrison,* 761 F.2d at 248. Absolute immunity is justified and defined by the governmental functions it protects and serves, not by *motives* with which a particular officer performs those functions. *Brummett*, 946 F.2d at 1181.

According to Moore, Valder, in his relentless pursuit of Moore's indictment, "(1) tore up an immunity letter; (2) threatened a key witness with the prosecution of his son; (3) flew to Dallas to investigate the case; . . . (4) destroyed *Brady* material and made misrepresentations to the Court regarding the existence of *Brady* material"[4]; provided the other defendants with legal advice[5]; and (6) prosecuted Moore, in part, because Moore was publicly critical of the United States Postal Service ("USPS").[6] Such prosecutorial behavior, Moore contends, falls outside Valder's quasi-judicial role and should be considered investigatory or administrative in nature.

Giving full weight to Moore's allegations, the court

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[4]Plaintiffs' Surreply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (May 27, 1992) at 18.

[5]Plaintiff's Response to Defendants' Motion to Dismiss (April 14, 1992) at 32-33.

[6]Original Complaint ¶ 16; Plaintiff's Response, n.5 above, at 29.

nevertheless concludes that Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder were prosecutorial functions -- regardless of his motives, malice, or bad faith. Under clear circuit precedent, Valder was, at all times material here, acting as a prosecutor, and he is therefore personally immune from liability on these claims.[7] All remaining claims[8] against Valder are accordingly dismissed.

b. Postal Inspectors Hartman, Kormann, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants ("Postal Service Employees")

The court agrees with Moore that the defendant postal service employees are not clothed with a derivative immunity that would make them absolutely immune from suit. *See Malley v. Briggs,* 475 U.S. 335, 340-44 (1986) (police officers); *Harlow v. Fitzgerald,* 457 U.S. 800, 810-11 (1982) (presidential aides). The court concludes, however, that the postal service employees may assert qualified immunity from suit on those claims, an issue which is addressed below.

(i) Fifth Amendment/Due Process/Grand Jury Claim

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[7]Plaintiffs themselves recognize that "prosecutional [sic] immunity may be difficult to overcome" in this case, Plaintiffs' Surreply at 18, and that this circuit "has taken a rather expansive view of the scope of prosecutorial immunity." Plaintiffs' Response at 32.

[8]The nonconstitutional claims have already been dismissed. *See* note 1, above.

Qualified immunity shields government officials performing discretionary functions from liability for civil damages if their actions could reasonably have been considered consistent with the rights they are alleged to have violated. This doctrine affords an "*immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985) (emphasis in original). The court must assess the objective legal reasonableness of their actions, in light of the rules that were clearly established at the time. The contours of Moore's rights must have been clear enough for a reasonable official to have understood that he was violating those rights. Thus, in light of the preexisting law, the unlawfulness of the defendants' acts must have been apparent. *Anderson v. Creighton,* 483 U.S. 635, 638-40 (1987); *Matherne v. Wilson,* 851 F.2d 752, 756-57 (5th Cir. 1988); *Hodorowski v. Ray,* 844 F.2d 1210, 1216-17 (5th Cir. 1988). The court must measure the "law's certainty" against "an objectively reasonable view of the facts facing an official." *Matherne,* 851 F.2d 756. A balance must be struck between the interests of vindicating citizens' constitutional rights and of public officials' ability to effectively perform their duties. The balance is destroyed if officials cannot reasonably anticipate when their conduct may give rise to liability for damages. *Davis v. Scherer,* 468 U.S. 183, 195 (1984). Therefore, to overcome defendants' qualified immunity defense, Moore must show that no reasonable postal inspector could have believed that the conduct complained of was lawful.

Moore alleges that the postal service employees engaged in a pattern of tactics designed to mislead and abuse the grand jury process and to deprive him of his fifth amendment right to due process and to an informed, fair, and impartial grand jury. All of these alleged acts arose out of the defendants' conduct in the preparation of evidence -- both exculpatory and otherwise -- for presentation to a grand jury. As defendants pointed out,[9] courts have disagreed in the past as to the conduct required of

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[9]Defendants' Motion to Dismiss, pp. 9-19.

government officials when collecting and preparing evidence to place before a *grand jury*. Recently, in *United States v. Williams*, __ U.S. __, 112 S.Ct. 1735 (1992), the Court held that withholding exculpatory evidence from a grand jury does not violate a criminal defendant's constitutional right to an unbiased and independent grand jury. 112 S.Ct. at 1744-45. At the time of the conduct alleged here, the law's uncertainty[10] concerning the procurement and presentation of evidence to the *grand jury* would have made it impossible for a reasonable official to have understood that he was violating Moore's rights. *See Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989). As a result, dismissal of Moore's claim of violation of due process and of the right to an informed, fair and impartial grand jury is required. *See Siegert v. Gilley*, __ U.S. __, __, 111 S.Ct. 1789, 1793-94 (1991).

(ii) First Amendment Claim and Malicious Prosecution Claim

Moore claims that the postal inspectors prosecuted him in retaliation for exercise of his first amendment rights. In addition, he maintains that the postal inspectors prosecuted him out of malice or "bad faith." A cause of action under rubric of "retaliatory prosecution" is properly pled where (1) the plaintiff's conduct is constitutionally protected; and (2) the protected conduct was a motivating factor in the decision to prosecute. *See Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979); *Rackovich v. Wade*, 850 F.2d 1180, 1189-90 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988). To succeed on a claim of retaliatory prosecution, Moore must show that the prosecution was motivated in part by the defendants' desire to retaliate against him for exercising his constitutional rights. *See Gates v. City of Dallas*, 729 F.2d 343, 345 (5th Cir. 1984). A "bad faith" prosecution is

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[10]For the conflict in decision among the circuits, *see United States v. Page*, 808 F.2d 723, 727 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987).

one initiated without probable cause. *See Wheeler v. Cosden Oil and Chemical Company,* 734 F.2d 254, 260-61 (5th Cir.), modified in part, reh'g denied, 744 F.2d 1131 (1984). To successfully state a malicious prosecution claim against a law enforcement official, it is only necessary to plead that the official deliberately provided false and misleading evidence to obtain an indictment. *See Wheeler,* 734 F.2d at 260.

On each of these claims, Moore has met his burden under the rule 12(b)(6) standard. He has asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief. Discovery should therefore proceed on both of these claims.

B. Personal Jurisdiction

When nonresident defendants move to dismiss for lack of personal jurisdiction, the plaintiffs bear the burden of establishing the trial court's jurisdiction over them. *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1270 (5th Cir. 1983). If the district court chooses to decide the matter without an evidentiary hearing, the plaintiffs may meet their burden by presenting a prima facie case for personal jurisdiction. *Id.* at 1270-71. The court will take the allegations of the complaint as true, except where they are controverted by opposing affidavits, and all conflicts in the facts are resolved in favor of the plaintiff. *Thompson v. Chrysler Motors Corporation,* 755 F.2d 1162, 1165 (5th Cir. 1985). In making its determination, the court may consider affidavits, interrogatories, depositions, oral testimony, or any combination of recognized discovery methods. *Id. Stuart v. Spademan,* 772 F.2d 1185, 1192 (5th Cir. 1985).

A federal court may only exercise personal jurisdiction if it is authorized to do so by law and such exercise does not violate the Constitution. In a federal question case in federal court, the relevant constitutional provision is the due process clause of the fifth amendment. *Burstein v. State Bar of California,* 693 F.2d

511, 514 (5th Cir. 1982). The law authorizing such service is Rule 4(e), F.R. Civ. P. The second sentence of that rule, authorizing service on non-resident defendants "under the circumstances and in the manner prescribed in the statute," allows resort to a state long-arm statute "only to reach those parties whom a court of the state could also reach under it." *Id.* at 514. *Accord, DeMelo,* 711 F.2d at 1266-69; *Point Landing, Inc. v. Omni Capital International, Ltd.,* 795 F.2d 415, 424-27 (5th Cir. 1986) (en banc), *aff'd,* 484 U.S. 97 (1987).[11]

The Texas long-arm statute authorizes suit against a non-resident defendant "if the nonresident. . . commits a tort in whole or in part in [Texas]." TEX. CIV. PRACT. & REM. CODE § 17.042(2) (Vernon 1986). Because this statute has been interpreted to extend to the constitutional limits of due process, *Helicopteros Nacionales de Colombia,* 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds,* 468 U.S. 408 (1984), "a non-resident's amenability to personal jurisdiction under the Texas long-arm statute collapses into a federal-style inquiry as to whether jurisdiction comports with federal constitutional guarantees." *Bullion v. Gillespie,* 895 F.2d 213, 215-16 (5th Cir. 1990).

According to the plaintiffs, the individual defendants are subject to the jurisdiction of this court because they committed torts which had foreseeable effects in Texas. The Supreme Court, however, has expressly rejected such a test. *See Burger King Corporation v. Rudzewicz,* 471 U.S. 462, 474 (1985) ("[a]lthough it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for

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[11]Most cases deciding the reach of state long-arm statutes have arisen in a diversity context. *Burstein, DeMelo,* and *Points Landing* ,by contrast, are federal question cases where the statute presenting the federal question does not authorize nationwide service of process.

exercising personal jurisdiction") (emphasis in original).

It has also been held, moreover, that where defendants' contact with the forum rests solely on "the mere fortuity that the plaintiff happens to be a resident of the forum," due process requirements are not satisfied. *Southmark Corporation v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988) (citing *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985)). All that the plaintiffs have shown regarding the individual defendants' contracts with Texas amounts to no more than such a fortuity.

Although the plaintiffs have discussed various contacts some of the individual defendants had with Texas or with Moore in Texas in their official capacities, such contacts cannot serve, in and of themselves, as a basis for obtaining personal jurisdiction over the defendants in their individual capacities. *Stephens v. Coleman*, 712 F. Supp. 1571, 1576 (N.D. Ga. 1989), *aff'd*, 901 F.2d 1571, 1578 (11th Cir.), *cert denied*, __, U.S. __, 111 S.Ct. 555 (1990) ("[p]laintiff has not given sufficient information relative to [defendant] Dunst's activities or contacts as they pertain to plaintiff while on [her official visits] to Georgia from Washington, D.C.]"). Furthermore, even were sufficient contacts with Texas established, the court would still have to consider the "reasonableness" of maintaining jurisdiction here, i.e., whether the assertion of personal jurisdiction in this court would comport with traditional notions of fair play and substantial justice. *Id.*, 712 F. Supp. at 1576 and 1577 ("reasonableness" factors indicated that records and witnesses were likely located in Washington, D.C., and that "case could be more efficiently handled in that forum"). *See also Edmond v. United States Postal Service*, 727 F. Supp. 7, 9-10 (D.D.C. 1989) (Revercomb, J.), case quite similar factually to this case, in which it was held that a nonresident assistant U.S. attorney was not subject to the jurisdiction of the court.

Plaintiffs have failed to demonstrate that the individual defendants are subject to the jurisdiction of this court. Although

the defendants' motion to dismiss on this ground is meritorious, the court has determined the transfer, rather than dismissal, is the appropriate relief. 28 U.S.C. § 1406(a).

IV. CONCLUSION

In summary, defendants' motion to dismiss all constitutional claims brought by Mrs.. Moore against the defendants is GRANTED; their motion to dismiss Moore's constitutional claims against Valder is GRANTED; their motion to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants is GRANTED as to the fifth amendment/due process and fair and impartial grand jury claims but is DENIED as to the malicious prosecution and first amendment claims; and their motion to dismiss for want of personal jurisdiction, though meritorious, will be denied in favor of transfer to the United States District Court for the District of Columbia, a district in which the defendants are, under the plaintiffs' allegations, subject to jurisdiction.

Accordingly, all claims not dismissed by this memorandum order are TRANSFERRED to the United States District Court for the District of Columbia.

SO ORDERED.

September 21, 1992.

A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM G. MOORE, JR. AND BLANCHE K. MOORE, Plaintiffs, v. JOSEPH B. VALDER, MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, DANIEL HARRINGTON, (FIRST NAME UNKNOWN) ROBBINS, AND OTHERS as of yet unknown, hereby designated as John Doe defendants 1-25, Defendants	Civil Action No._____

ORIGINAL COMPLAINT

I. JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1331 and 1367(a). This suit is authorized by the First, Fourth and Fifth Amendments of the Constitution of the United States and such other State and Federal laws as may be applicable. Venue in this action is properly situated in the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. §§ 1391(b) and (e). Plaintiffs seek damages in excess of $50,000 for injuries sustained

by them which were caused by the actions of the defendants.

II. PARTIES

2. Plaintiff William G. Moore, Jr. is a citizen of the United States who resides in Dallas, Texas. Plaintiff is the former Chairman, President and Chief Executive Officer of Recognition Equipment Incorporated ("REI").

3. Plaintiff Blanche K. ("Chelen") Moore is the wife of Plaintiff William G. Moore, Jr. and resides with him in Dallas, Texas.

4. Defendants are employees of the United States Government and its agencies, including the United States Department of Justice and the United States Postal Service ("USPS"), who, acting in their ministerial and individual capacities, did conspire to interfere with and violate, and did interfere with and violate, plaintiffs' rights and privileges, and did deprive Plaintiff William G. Moore, Jr. of his liberty and both plaintiffs of their property without due process of law, in conflict with the laws and Constitution of the United States and the laws of the State of Texas and the District of Columbia, as more fully appears herein below. Such defendants include:

a. Defendant Joseph Valder, who was at all relevant times an Assistant U.S. Attorney for the District of Columbia. Said defendant was responsible for the investigation and the overseeing of the Grand Jury investigation which culminated in the wrongful indictment of Plaintiff William G. Moore, Jr. Defendant Valder, acting individually and/or in concert with the other defendants, also was responsible for the pre-trial activities and trial of the case against Plaintiff William G. Moore, Jr. Said defendant is sued in his individual capacity.

b. Defendants Frank Korman,

Michael Hartman, Robert Edwards, Pierce McIntosh, Daniel Harrington, (first name unknown) Robbins, and Postal Inspectors and other employees of the USPS who are presently unknown to plaintiffs (and hereinafter are referred to as "John Doe defendants 1-25"), and who were at all relevant times Postal Inspectors of the United States Postal Inspection Service or otherwise employed by the USPS. Defendants Korman and Hartman oversaw the investigation and were involved at all relevant stages. Each defendant Postal Inspector is sued in his own individual capacity. All of the defendant Postal Inspectors, whether known or unknown, shall be referred to collectively as "Postal Inspectors."

III. NATURE OF THIS CASE

5. The incidents on which plaintiffs' lawsuit is based occurred as a result of malicious, deliberate, intentional, reckless and negligent misconduct by Assistant United States Attorney Joseph Valder and the U.S. Postal Inspection Service and its agents, as named and/or described above, before, during, and after a Grand Jury investigation which culminated in an indictment being returned against Plaintiff William G. Moore, Jr., REI, and another employee of REI on October 6, 1988 in Washington, D.C. All defendants in the indictment were acquitted of all charges by United States District Judge George Revercomb on November 20, 1989. It became apparent that the investigation, Grand Jury proceedings and handling of the post-indictment proceedings by the defendants were punctuated by gross violations and abuses of plaintiffs' rights as detailed below.

6. This action is brought to seek fair compensation for the catastrophic financial injury, humiliation, mental suffering and anguish inflicted upon plaintiffs as a result of the wrongful acts of defendants. This action is also filed to ensure

that these defendants and others are deterred from engaging in such wrongful activity again.

IV. FACTS

7. Plaintiff William G. Moore, Jr. is the former Chairman, Chief Executive Officer and President of REI. He is a graduate of Georgetown University and has served on its Board of Regents. He served in the U.S. Army, obtaining the rank of Captain, and saw service in Vietnam. REI was a manufacturer of, among other products, optical character recognition ("OCR") systems. The Company was at all relevant times headquartered in Irving, Texas. At the time Moore joined REI in 1982, the company, which had suffered losses for five years, had lost $14.2 million in the preceding year and was on the verge of bankruptcy. Within one year, Moore had turned REI around, and REI reported net income of $9.5 million. By 1986, REI had reached $241.8 million in revenues, and it was considered one of the most dynamic and successful publicly-held corporations in the Dallas area. Because of his success, Moore was the recipient of various significant honors from organizations across the country, including being named Dallas Business Man of the Year. He served as Chairman of the American Electronics Association and on the Boards of various civic and charitable organizations.

8. REI had developed multi-line optical character reading ("MLOCR") equipment which would automatically read several lines of an address to code and assign a nine-digit zip code to a piece of mail. REI desired to sell the product to USPS. REI believed it would speed up the mail system and save USPS millions of dollars per year.

9. At the time relevant to the charges in the indictment, USPS was employing single-line OCR equipment which could only read the bottom line of an address, and the efficiency of single-line technology was dependent upon the public use of the nine-digit zip code. The single-line OCR technology

was not successful because the public use of the nine-digit zipe code did not meet USPS' expectations. Since the indictment, USPS has converted its automated sorting equipment to multi-line technology.

10. At the time of Moore's arrival at REI, there had been a longstanding conflict between REI and various senior managers within USPS. In late 1983, then Postmaster General William Bolger announced that there would be no future for multi-line technology in the automation plans of USPS. One high-ranking postal manager stated that REI would never receive any multi-line production awards as long as he was with USPS.

11. After the single-line decision by USPS, Plaintiff William G. Moore, Jr. informed Postmaster General Bolger that single-line technology was an unsound strategy, and that Moore intended to go directly to USPS Board of Governors, the media, and the United States Congress to try and stop the ineffective and wasteful single-line implementation. Moore did, in fact, -- as he was Constitutionally permitted to do -- communicate about the subject with various Congressmen and Senators, including Texas Congressmen Jack Brooks and the late Mickey Leland, Missouri Congressman Richard Gephardt and Alaska Senator Ted Stevens. As previously noted, USPS now uses the multi-line approach advocated by REI.

12. In the course of REI's efforts to obtain contracts from USPS, which was supposed to review in an open, fair and impartial manner all competing technologies for mail scanning and sorting equipment, REI hired the consulting firm of Gnau and Associates, Inc. ("GAI"). John Gnau was a principal of GAI. The use of this consulting firm had been suggested to REI by a member of the USPS Board of Governors.

13. In early 1985, the U.S. Postal Inspection Service began an investigation into possible illegal payments from Gnau to Peter E. Voss, then a member of the USPS Board of Governors. It was later determined that a conspiracy in which

Gnau made illegal payments to Voss existed between Voss, John Gnau, Michael Marcus (the Treasurer of GAI) and William Spartin (President of GAI). Voss, Gnau and Marcus pled guilty to criminal charges. Spartin and Sharon Peterson, an administrative assistant to Voss, agreed to cooperate in exchange for immunity from prosecution. Frank Bray, REI's Vice President of Distributor Sales, also received immunity.

14. During the investigation, Defendant Valder and the Postal Inspectors, including at least Defendants Hartman and Korman as well as various other unknown defendants, desperately tried to find a way to link William G. Moore, Jr. to the conspiracy. However, the evidence clearly and unequivocally demonstrated that Moore knew absolutely nothing about the conspiracy. None of the thousands of documents subpoenaed by the Grand Jury during the investigation indicated that Moore, or for that matter REI, had knowledge of the conspiracy and related unlawful activities. Moore repeatedly informed the Postal Inspectors and AUSA Valder that he had no knowledge of the conspiracy. None of the five admitted conspirators - Voss, Gnau, Marcus, Peterson and Spartin - gave any testimony even remotely indicating that Moore knew of, or participated in, the conspiracy. In fact, several conspirators testified at trial that they actively tried to disguise the conspiracy from Moore and had previously told that to Valder and certain of the other defendants.

15. The obvious issue in any criminal action against Moore would be whether he had knowledge of and participated in the conspiracy or the unlawful acts of the consultants and Voss. The evidence gathered in the massive investigation showed clearly and without exception that Moore had no knowledge of the conspiracy or the unlawful acts. The Postal Inspectors and AUSA Valder knew that such lack of knowledge would prevent the return of any proper indictment against Moore. Notwithstanding the above, Defendants Valder, Hartman, Korman, Edwards, McIntosh, Harrington, Robbins, and the John Doe defendants who are presently unknown to plaintiffs, deliberately, systematically and without regard to Moore's Constitutional right

to fair investigation and fair consideration by the Grand Jury, concealed from the Grand Jury crucial and extensive exculpatory testimony from the co-conspirators (Gnau, Peterson, Marcus, Spartin and Voss) that Moore was not told about, and did not know about, the unlawful scheme to pay kickbacks to Voss.

16. Defendants engaged in unusual, unlawful and unconstitutional investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted. These activities were done in clear disregard of the defendants' obligations as employees of the United States; these activities were done by defendants with malice and in clear violation of Moore's right to a fair investigation; these activities were done by defendants in an attempt to obtain publicity for themselves and seek career advancement; and these unlawful activities were done by defendants in an attempt to "punish" Moore for exercising his constitutionally-protected rights to criticize USPS procurement decisions.

17. By concealing and distorting the evidence as they did, AUSA Valder and the Postal Inspectors acted outside their discretion, violated their employer's policies and procedures, and knowingly violated plaintiffs' clearly established Constitutional rights. The methods designed by the defendants to withhold key exculpatory evidence and to manufacture false and misleading testimony are detailed below.

18. AUSA Valder and the Postal Inspectors drafted and used written "witness statements" to shape the evidence presented to the Grand Jury. These misleading "witness statements" were false, inaccurate, incomplete and misleading and were presented to the Grand Jury even though live witnesses were available to testify. Even though all the witnesses told AUSA Valder and the Postal Inspectors that Moore was unaware of the conspiracy, not one single witness statement written by the Postal Inspectors included this crucial, exculpatory statement.

Additionally, AUSA Valder and the Postal Inspectors refused to allow witnesses to amend these statements, even though it was supposedly the witnesses', not the Postal Inspectors', statements. These statements were thereafter presented to the Grand Jury as the witnesses' own statements. For example, Frank Bray was interviewed several times in an intimidating fashion by the Postal Inspectors, including Inspectors Edwards and Harrington, in an attempt to have him change his testimony that Moore was unaware of the conspiracy. Incredibly, AUSA Valder and the Postal Inspectors refused to allow Bray to include in "his" statement that, to his knowledge, REI and Moore were not aware of the payoffs. Bray and his attorney, Ellen Huvelle (now a Judge on the Superior Court of the District of Columbia) amended their version of Bray's statement to include such language, but the Postal Inspectors refused to change it. Moreover, Bray and Ms. Huvelle were not permitted to take the amended version of Bray's statement with them after their meeting with the Postal Inspectors, and the amended version mysteriously disappeared by the time of trial. The Grand Jury was thereafter read the statement written by the Postal Inspectors, which purported to be Bray's statement, without the exculpatory statement. Additionally, AUSA Valder promised Bray and Ms. Huvelle that he would ask Bray the key questions about Moore's knowledge in the Grand Jury, but Valder thereafter refused to do so.

19. John Gnau and Peter Voss were the two leaders of the conspiracy. Gnau repeatedly told the Postal Inspectors that he never told Moore about his illicit relationship with Voss. However, "his" statement written by the Postal Inspectors deliberately omitted this fact. Voss, who was serving a prison sentence on these charges and was clearly available to the Government, was never called by the Government to testify at trial.

20. Despite the fact that Postal Inspectors are trained to take detailed notes, virtually none of the notes taken by Postal Inspectors during their interviews of various witnesses contained the witnesses' crucial statements to the effect that Moore

was not told of the conspiracy. These key statements were deliberately omitted by the Postal Inspectors in order to avoid their responsibility to conduct a fair investigation and to preserve exculpatory material.

21. AUSA Valder and the Postal Inspectors threatened and intimidated William Spartin in an attempt to coerce incriminating testimony from him after he repeatedly told the Government that to his knowledge, Moore did not know of the payoffs to Voss. Such tactics included a pre-planned tearing-up of Spartin's immunity letter in front of him and threats to prosecute Spartin's son. This was despite the fact that a lie detector test had indicated that Spartin was being truthful when he said Moore and REI were not informed of the conspiracy. Moreover, unbeknownst to Spartin, the lie detector test was conducted by Inspector Robbins, who repeatedly tried to trick and coerce Spartin into giving incriminating testimony against Moore.

22. AUSA Valder and the Postal Inspectors, including Inspector McIntosh, violated Federal Rule of Criminal Procedure 6(e)(2), which protects the secrecy of Grand Jury proceedings, by giving Spartin and former Postmaster General Paul Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service. The Postal Inspectors even gave Carlin a copy of a draft indictment for his review.

23. AUSA Valder deliberately withheld Brady v. Maryland exculpatory material from attorneys for Moore and REI before and during their trial, despite a Court Order to turn over even "borderline" Brady material. Such Brady material included the results of lie detector tests in which Mr. Spartin made 19 references to Moore's and REI's lack of knowledge as to the conspiracy, and the amended version of Frank Bray's statement in which he added a paragraph that to his knowledge, Moore and REI

were unaware of the payoffs. If this material had been turned over to the defense as it should have been, Moore would likely have been spared the expense and humiliation of a long, extensively publicized trial.

24. Through the use of the above malicious, improper and unconstitutional tactics, AUSA Valder and the defendant Postal Inspectors were able to obtain an indictment against William G. Moore, Jr. However, nowhere in the 46-page conspiracy charge -- nowhere in its 10 objects, 58 means and methods or 96 overt acts -- did the charge allege that Moore or REI even knew that GAI was paying bribes to Voss, much less that they agreed to these payments. This deliberate attempt to hide the only real issue in the indictment by pure volume and verbosity was not successful. Following the Government's presentation of its case at trial, Judge George Revercomb acquitted Moore and all other defendants.

25. After the indictment, REI was debarred from all postal procurement. The United States forced REI to place Moore on leave of absence and to sever him from any management involvement with REI. As a result of the indictment, the Company began to flounder and the stock price plunged. The company was eventually the subject of a takeover attempt, had a change of control and Plaintiff William G. Moore, Jr. lost his job. The wrongful investigation/indictment and prosecution prevented REI from bidding, and in all probability winning, hundreds of millions of dollars in postal automation contracts. The wrongful investigation/indictment caused the plaintiffs to sustain severe financial injury.

26. Following the indictment, Plaintiff William G. Moore, Jr. was subjected to the various aspects of criminal justice system processing, including arraignment and fingerprinting. He was processed not once, but twice; one time by the Postal Inspectors, and the second time by the District of Columbia police. He was briefly jailed in the District of Columbia during this processing.

27. There was a tremendous amount of media publicity during the unlawful investigation, following the indictment and during the trial, all of which caused plaintiffs humiliation, physical and mental suffering and anguish, and which required medical treatment for both plaintiffs.

28. The indictment named as part of the overt acts of the conspiracy such Constitutionally protected actions as the plaintiffs' lobbying of Congress for changes to the mail system. The defendants also sought to prosecute Plaintiff William G. Moore, Jr. for suggesting qualified candidates for the position of Postmaster General, even though he had been requested to do so by the White House and was Constitutionally entitled to do so.

29. As a result of the above-described unlawful activity and violations of plaintiffs' Constitutional rights, plaintiffs suffered and continue to suffer great financial losses, humiliation, embarrassment, physical and mental suffering, as well as loss of reputation in and among business associates, friends, and family.

30. As a result of the above-described unlawful activity and violations of plaintiffs' Constitutional rights, including voluminous unreasonable requests for personal and business documents, including tax returns and bank records, and alleged surveillance and possibly wiretaps, defendants did invade the privacy of the plaintiffs and cause them injury.

31. AUSA Valder and the Postal Inspectors are not entitled to official immunity for the following reasons:

a. The actions of AUSA Valder and the Postal Inspectors and the John Doe defendants violated clearly established Constitutional rights which a reasonable person would have known and recognized.

b. AUSA Valder and the Postal Inspectors and the John Doe defendants took the

described actions with the malicious intention to cause injury to plaintiff and to cause deprivation of plaintiffs' constitutional rights.

c. AUSA Valder and the Postal Inspectors had no discretion to act as they did since they violated, ignored and otherwise failed to comply with regulations and policies designed to guide their actions. The investigative tactics used were so extreme that no reasonable person would accept them as fair and lawful.

d. The Postal Inspectors undertook certain unlawful and improper actions on their own accord without direction from their supervisors or the United States Attorney's Office, including the disclosure of secret Grand Jury material to witnesses, as stated in the United States Department of Justice Office of Professional Responsibility's letter dated May 30, 1991.

e. AUSA Valder acted in an investigative capacity during the course of the investigation, thereby losing his objectivity and violating his duty to fairly uphold the laws of the United States.

f. AUSA Valder acted in a non-advocatory role during the investigation, especially when he withheld, and failed to preserve, exculpatory evidence.

g. AUSA Valder continually provided inaccurate and misleading legal advice to the Postal Inspectors investigating the case.

FIRST CAUSE OF ACTION

32. By the aforesaid withholding of exculpatory evidence and by the presentation of false and misleading evidence to the Grand Jury, the defendants deprived the plaintiffs of their rights to due process and to an informed, fair and impartial Grand Jury as guaranteed by the Fifth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

33. The aforesaid actions of defendants constituted a slander and defamation of Plaintiff William G. Moore, Jr. The actions taken also constituted an unlawful invasion of plaintiffs' privacy, false arrest and abuse of process and malicious prosecution, all in violation of the laws of the State of Texas and of the District of Columbia, which this Court may adjudicate as pendant to the other four causes of action.

THIRD CAUSE OF ACTION

34. By the aforesaid improper and malicious activities, the defendants deprived the plaintiffs of their property without due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

35. By the aforesaid improper and malicious activities, the defendants deprived the plaintiffs of their rights to be free from unreasonable seizures as guaranteed by the Fourth Amendment of the United States Constitution, in that Plaintiff William G. Moore, Jr. was seized as he awaited processing, and furthermore, plaintiffs were forced to post bond and attend a trial based upon the improperly obtained indictment.

FIFTH CAUSE OF ACTION

36. By the aforesaid improper and malicious activities, which caused plaintiffs to deplete financial and human resources, the defendants attempted to punish Plaintiff William G. Moore, Jr. because he directed criticism against the USPS, thereby depriving the Plaintiffs of their rights to free expression and to petition the government for redress of grievances guaranteed by the First Amendment of the United States Constitution.

DAMAGES

37. As a result of the investigation and indictment, REI stock, of which Plaintiff William G. Moore, Jr. owned more than 100,000 shares, dropped from about $22 per share to about $5 per share. A change of control at REI occurred during the trial which would not have taken place if there had not been an indictment. As a result, Plaintiff William G. Moore, Jr. lost his job and suffered extensive financial injury.

38. In the three years prior to the indictment, Plaintiff William G. Moore, Jr.'s average compensation was more than $1 million per year. After the indictment, the value of Moore's stock ownership declined from $2 million to $500,000. Plaintiff William G. Moore, Jr.'s stock options decreased in value by at least another $2 million, and his annual income was, and has been, greatly reduced.

39. As further result of the indictment, Plaintiff William G. Moore, Jr. has been unable to find a position comparable to his previous employment. Plaintiff's reputation has been damaged, and he has been forced to resign from a number of boards and appointments.

40. The ordeal of investigation, indictment and trial has exacted a terrible physical and emotional toll on plaintiffs. Shortly after being notified of the impending indictment in late

summer of 1988, Plaintiff William G. Moore, Jr. was treated at the emergency room at Parkland Hospital in Dallas for symptoms which were subsequently diagnosed as an acute stress reaction. Since the investigation began, Plaintiff Blanche Moore has suffered from chronic insomnia combined with Temporomandibular joint disorder (often called TMJ). She is currently under physician's care for chronic neck, back and leg pains.

41. WHEREFORE, Plaintiffs request this Court to assess compensatory damages against each defendant, jointly and severally, in at least the following amounts, and which amounts will be proven in detail at trial of this action:

(a) Lost Earnings - $17 million;
(b) Decrease in value of stock and stock options - $5 million;
(c) Personal suffering, humiliation and emotional distress - $10 million; and
(d) An amount adequate to compensate Mr. Moore for defense costs incurred during the investigation and trial.

42. In order to deter defendants and others from engaging in such unlawful and unconstitutional activities, Plaintiffs further request punitive damages against each defendant, plus costs and attorneys' fees, and any other and further relief as the Court may deem just and equitable.

DEMAND FOR JURY TRIAL

43. Plaintiffs hereby demand a trial by jury of all issues so triable in this cause of action.

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

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Dated November 19, 1991

UNITED STATES of America

v.

RECOGNITION EQUIPMENT INCORPORATED, William G. Moore, Jr., and Robert W. Reedy, Defendants.
Crim. No. 88-0385.

United States District Court,
District of Columbia.
Nov. 20, 1989.

Equipment manufacturing corporation and two of its officers were charged with conspiracy to defraud the United States in connection with sales of equipment to United States. Defendants moved for judgment of acquittal. The District Court, Revercomb, J., held that the evidence did not support a reasonable inference that defendants knew of an illegal agreement between a postal service official and a consulting firm hired by defendants.

Granted.

See also 720 F.Supp. 13.

CONSPIRACY k47(6)
91k47(6)
Evidence against manufacturing corporation and corporation's officers was insufficient to sustain convictions for conspiracy to defraud United States in connection with sale of equipment to United States; evidence did not support reasonable inference that defendants knew of scheme involving illegal payoffs between consulting firm hired by defendants and postal service official, who were unindicted coconspirators. 18 U.S.C.A. s 371.

***587** Joseph B. Valder, Eric M. Acker, Asst. U.S. Attys.,

Criminal Div., Sp. Prosecutions, Washington, D.C., Vincent L. Gambale, U.S. Dept. of Justice, Criminal Div., Fraud Section, Washington, D.C., for U.S.

John P. Cooney, Julie R. O'Sullivan, R. Scott Thompson, H. Lin Shiau, Davis Polk & Wardwell, New York City, Linda Chatman Thomsen, Davis Polk & Wardwell, Washington, D.C., Morris Harrell, Marshall Searcey, Lori B. Finkelston, Locke Purnell Rain Harrell, Dallas, Tex., for REI.

Charles A. Stillman, Marjorie J. Peerce, Stillman, Friedman & Shaw, P.C., New York City, for Moore.

Robert S. Bennett, David S. Krakoff, Amy R. Sabrin, Dunnells, Duvall, Bennett & Porter, Washington, D.C., for Reedy.

MEMORANDUM OPINION AND ORDER

REVERCOMB, District Judge.

This matter is before the Court pursuant to Defendants' Joint Motion for Judgment of Acquittal. FED.R.CRIM.P. 29.

The Defendants have been indicted with one count of conspiracy to defraud the United States, 18 U.S.C. s 371, one count of theft, 18 U.S.C. ss 1707 and 2, one count of receiving stolen property, D.C.Code ss 22-3832(a), 22- 3832(c)(1), 22-105, two counts of mail fraud, 18 U.S.C. ss 1341, 2, and two counts of wire fraud, 18 U.S.C. ss 1343, 2.

This Court finds that the government has failed to establish a prima facie case that the Defendants conspired to defraud the United States in violation of 18 U.S.C. s 371. The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminatory evidence is not persuasive of ***588** guilt when viewed

in its full context. In fact, some of the government's evidence is exculpatory and points toward innocent conduct of the Defendants. The government has conceded that in the absence of a prima facie finding of conspiracy all of the other counts in the indictment must also fail. Accordingly, it is hereby ordered that Defendants' motion for judgment of acquittal pursuant to FED.R.CRIM.P. 29 is granted.

I. Rule 29 Standard

Rule 29 of the Federal Rules of Criminal Procedure provides: "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment ... after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." The purpose of this Rule is to implement "the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant(s) may be put to [their] defense." United States v. Shafer, 384 F.Supp. 496, 497 (N.D.Ohio 1974) (quoting Cephus v. United States, 324 F.2d 893, 895 (D.C.Cir.1963)).

In considering a Rule 29 motion this Court must determine whether upon the evidence, viewed "in a light most favorable to the Government giving full play to the right of the [trier of fact] to determine credibility, weigh the evidence and draw justifiable inference of fact," a reasonable mind might fairly conclude guilt beyond a reasonable doubt. [FN1] United States v. Treadwell, 760 F.2d 327, 333 (D.C.Cir.1985), cert. denied, 474 U.S. 1064, 106 S.Ct. 814, 88 L.Ed.2d 788 (1986) (citing United States v. Davis, 562 F.2d 681, 683 (D.C.Cir.1977)); see also United States v. Reese, 561 F.2d 894 (D.C.Cir.1977); Curley v. United States, 160 F.2d 229, 232 (D.C.Cir.), cert. denied, 331 U.S. 837, 67 S.Ct. 1512, 91 L.Ed. 1850, reh'g denied, 331 U.S. 869, 67 S.Ct. 1729, 91 L.Ed. 1872 (1947). Although the evidence must be viewed in the light most favorable to the government, this Court is obligated to take a hard look at the evidence and accord the government the benefit of only "legitimate inferences." United

States v. Singleton, 702 F.2d 1159, 1163 (D.C.Cir.1983). In other words, this court will not indulge in fanciful speculation or bizarre reconstruction of the evidence. Moreover, this Court is not required to view the evidence through dirty window panes and assume that evidence which otherwise can be explained as equally innocent must be evidence of guilt. This is clearly not the standard of Rule 29. See Curley, 160 F.2d at 233 (if "a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained"). Rather, in order to find a legitimate and nonspeculative inference of guilt the government must articulate a rational basis in the evidence upon which that inference can arise.

FN1. However, although this is a bench trial, this Court is not the trier of fact at this point and cannot determine credibility of witnesses until after the defense has presented its case and all of the witnesses have been cross-examined. In deciding a Rule 29 motion the Court at this time is simply applying a legal standard to the government's evidence. Moreover, in reviewing the evidence, this Court does not consider Defendants' joint motion to dismiss the indictment with prejudice due to prosecutorial misconduct nor the government's response thereto.

This Court must grant Defendants' motion for judgment of acquittal if it finds that the evidence, even if viewed in the light most favorable to the government, is such that a reasonable trier of fact would have a reasonable doubt as to the existence of any of the essential elements of the crime. United States v. Durant, 648 F.2d 747 (D.C.Cir.1981); see also United States v. Foster, 783 F.2d 1087, 1088 (D.C.Cir.1986).

II. Conspiracy Count

The indictment charges that the Defendants, Recognition Equipment Inc. (REI or the Company), William G. Moore, Jr., the Chief Executive Officer and Chairman of the Board of Directors of REI, and Robert W. Reedy, Vice President for Marketing at REI, conspired with several unindicted coconspirators ***589** to

defraud the United States Postal Service (USPS) in attempts to obtain a contract for the Company's multiline optical character reading (MLOCR) equipment. [FN2]

FN2. REI had developed MLOCR equipment which would automatically read several lines of an address to code and sort the mail. At the time relevant to the charges in this indictment the USPS was employing singleline OCR which could only read the bottom line of an address and the efficiency of singleline technology was dependent upon the public use of the nine-digit zip code. The SLOCR technology was not successful because the USPS had greatly underestimated the public use of the nine-digit zip code. The USPS is now converting its automated sorting equipment to multiline technology.

The unindicted coconspirators included: (1) Peter E. Voss who was, prior to May 30, 1986, a member of the Board of Governors of the United States Postal Service and was, at various times, a member of the Board of Governors Contingency Committee, a member of the Board of Governors Technology and Development Committee, a member of the Board of Governors Planning and Executive Resources Committee, and the Vice Chairman of the Board of Governors; (2) Sharon R. Peterson, who was an administrative assistant to Voss; (3) John R. Gnau, Jr., who was a principal of the consulting and public relations firms of Gnau, Carter, Jacobsen and Associates, Inc., John R. Gnau, Jr. and Associates, Inc., and Gnau & Associates, Inc. (GAI); (4) Michael B. Marcus, who was a Director and the Treasurer of Gnau, Carter, Jacobsen and Associates, Inc. and a Director, the Vice President and Treasurer of GAI; and (5) William A. Spartin, who was President of GAI and President and Managing Director of MSL International Consultants Limited, an executive placement firm, which was a subsidiary of the Hay Group.

To establish a prima facie case under 18 U.S.C. s 371, the government must prove that (1) an agreement existed among the Defendants to defraud the USPS; (2) the Defendants knowingly

participated in the conspiracy with the intent to defraud the USPS; and (3) that one or more persons knowingly and willfully committed an overt act in furtherance of that objective. United States v. Treadwell, 760 F.2d 327 (D.C.Cir.1985), cert. denied, 474 U.S. 1064, 106 S.Ct. 814, 88 L.Ed.2d 788 (1986); United States v. Puerto, 730 F.2d 627 (11th Cir.1984); United States v. Browning, 723 F.2d 1544 (11th Cir.1984). For purposes of analysis this Court separates the conspiracy count into two parts: the Voss/Gnau payoff scheme and the Spartin personnel scheme. This Court finds that the evidence, viewed in the light most favorable to the government, does not support a reasonable inference that the Defendants knew of either scheme and that accordingly the government has failed to establish a prima facie case that the Defendants joined a conspiracy.

A. Voss/Gnau Payoff Scheme

There is no doubt that a conspiracy existed between Voss, Gnau, Marcus, and Spartin whereby Voss received illegal payments from Gnau for referring REI to GAI. On May 30, 1986, Voss plead guilty to two counts of accepting a gratuity in violation of 18 U.S.C. s 201(g) and one count of embezzlement and misappropriation of government property in violation of 18 U.S.C. s 1707. See Criminal No. 86-195. On October 17, 1986, Gnau plead guilty to one count of conspiracy to defraud in violation of 18 U.S.C. s 371 and one count of paying an illegal gratuity in violation of 18 U.S.C. s 201(f). See Criminal No. 86-355. On January 20, 1987, Marcus plead guilty to two counts of aiding and abetting in paying an illegal gratuity in violation of 18 U.S.C. s 201(f). See Criminal No. 87-023. Spartin entered an agreement with the United States Attorney's office whereby he agreed to cooperate in the investigation in exchange for immunity from prosecution, if in fact prosecution would have been warranted, for any federal crime arising out of his activities involving the United States Postal Service. [GEX BS1, BS4]

Voss and Gnau had a criminal venture in operation before Voss had approached REI with the proposal that REI hire the

services of Gnau. In December 1983 Gnau was promising Voss that if the USPS purchased some Chicago property that was owned by ***590** a GAI client that he "would take care of him." [Tr. 619] Voss and Gnau had established a scheme whereby Gnau would send checks in the name of Decision Systems, Inc., for "industrial leads" or referrals to GAI. [Tr. 621-22] Prior to the time that Voss had approached REI, Voss and Gnau had targeted several companies for whom GAI could provide postal-related representation and use Voss' USPS connection to their benefit. [Tr. 620-37] No evidence has been presented that REI, Moore or Reedy knew of this criminal scheme.

1. The Voss Referral

The basic operative fact upon which the Government relies as indicia of conspiracy is that Voss in early September 1984 recommended to the Defendants the services of a specific consulting/lobbying firm for the promotion of the Defendants' product before the USPS. The government contends that a referral by a Governor of the USPS itself should have put the Defendants on notice.

Voss met with Reedy at the Mansion restaurant in Dallas on September 3, 1984 while Voss was there for the Technology Committee meeting with ECA. [Tr. 1176] During this meeting Voss told Reedy that he believed REI had a good product and that in the interests of the USPS he wished that REI would retain someone to aid them in packaging and presenting their product to the USPS. [Tr. 1176-77]

Robert Bray, REI's Vice President of Distributor Sales, testified that Reedy told him that Reedy asked Voss for suggestions as to someone who could help REI sell its product before the USPS but that Voss "was very hesitant to give names of any company [because it] wasn't his place to do so." [Tr. 1177] However, upon further queries from Reedy, Voss suggested GAI. [Tr. 1177]

This Court cannot find a legitimate inference from the fact of the referral itself that REI knew or should have known that a kickback scheme was being put into place. The government presented no evidence of the impropriety of a Governor having lunch with an officer of a company who was seeking to do business with the USPS. Several months prior to the time that Voss met with REI, he had publicly expressed caution in proceeding with singleline technology before studies ordered by Congress on the multiline/singleline debate were completed. [Tr. 1583] Moreover, the issue of multiline versus singleline technology was not simply a formal procurement issue within the USPS but was a subject of significant public debate involving executive studies, legislative inquiries and broad media exposure. [FN3] At a June 14, 1984 Congressional hearing the Office of Technological Assessment (OTA), the General Accounting Office (GAO) and postal management presented their respective views on OCR technology. [Tr. 1586] The GAO and OTA studies that were presented to Congress concluded that as a result of the USPS failure to convert to multiline technology the daily operational losses of the USPS were over one million dollars. [Tr. 1592] The inference that Reedy had to know in this context that Voss, a high and respected official of the United States government, who had been appointed by the President of the United States and confirmed by the United States Senate, 39 U.S.C. s 202(a), was initiating a scam to fill his own pockets is not justified.

FN3. As evidence of the divisiveness of this very public debate Governor McKean testified that half of the Texas Congressional delegation was in favor of multiline technology and the other half of the Texas delegation was in favor of singleline technology. [Tr. 2839]

2. Post-referral Conduct

Subsequent to the Voss referral the evidence suggests that REI cautiously exercised its business judgment in formulating a contract with GAI to represent it in the promotion of its product before the USPS. The Defendants did not immediately act upon

Voss' recommendation to retain GAI.

GAI and REI did not reach a formal and executed agreement until almost six months after the initial referral by Voss. Although Gnau was ready to sign an agreement with REI as early as October 12, 1984 in a meeting with Reedy [GEX 107; Tr. *591 640-41, 643-45, 293-94]--five weeks after the Voss referral--the Defendants were unwilling to enter into an agreement without further consideration. In apparent frustration over the Defendants' delay in signing an agreement and their failure to return his telephone calls, Gnau did not complain to the Defendants but instead complained to Voss. [Tr. 645, 293, 307]

Bray testified that Reedy told him that Reedy did not want to hire GAI at any time prior to the November elections because, based on Gnau's representation, GAI was a politically-oriented consulting firm and Reedy thought that REI should wait until the political future of Washington, D.C. was clearer. [Tr. 1185] GAI and REI had not signed a contract in 1984 and as the new year began GAI was still having to sell itself to REI. GAI came to REI in Dallas on January 3, 1985 [Tr. 316, 322, 1978-79; GEX 473] and on January 7th or 8th Bray and an REI engineer visited GAI at its Bloomfield Hills, Michigan office to assess the technical competence of GAI to perform consulting services on behalf of REI. [Tr. 1621-22]

On January 8, 1985, Gnau wrote to Reedy to tell him that he had set up a meeting with Postmaster General (PMG) Paul N. Carlin on January 11, 1985 and asked for confirmation of a proposed consulting arrangement. [RR Ex. 30] Gnau testified that he did not tell REI that it was in fact Voss who set up the meeting between GAI and Carlin because Gnau was attempting to impress REI with the fact that GAI could secure for REI the political access it previously had been denied. [Tr. 655-57, 704].

On January 10, 1985, Reedy responded by a letter stating that REI intended to complete contract discussions and enter into a formal agreement with GAI in the following weeks and asked

that GAI begin its representation of REI in its scheduled meeting with Carlin on January 12, 1985. Accordingly, Reedy enclosed with the letter a check for $10,000 as a partial payment toward the $30,000 retainer fee that GAI required. [RR Ex. 31; Tr. 658]

The meeting between GAI and Carlin was not encouraging for REI's interests. Carlin said that he did not want to interfere with his senior staff in this area and stated that "when it comes to multi-line technology and REI, there's nothing I can do for you in this regard." [Tr. 345] He suggested that GAI take REI's case up with the Technology Committee. Gnau did not inform REI of the disappointing results of his meeting with Carlin. Instead, on January 22, 1985, Gnau wrote to Moore to seek a date for a meeting at which they could finalize their proposed contract. [GEX 170] He wrote that, in his opinion, they could secure a formal review by the Board's Technology Committee and the eventual purchase order of 40-100 MLOCRs within 90-120 days from the beginning of January. Gnau's deception of REI--his alleged coconspirator--is unexplained.

During the latter half of January 1985 and most of February 1985, Bray participated at various times, together with REI's General Counsel Thomas A. Loose, and Associate General Counsel Carol Lyon, in drafting the formal agreement between GAI and REI. [Tr. 1623] As originally contemplated, REI would pay GAI a $30,000 retainer and expenses. However, as to GAI's proposal that it receive 2% of the value of any contracts that the USPS awarded to REI, REI negotiated the contingency fee down to 1%. [Tr. 1624-25; GEX 189]

The contract was finally executed by REI on February 26, 1985 and returned signed by Gnau to REI on February 28, 1985. [GEX 189A, 189B] The government argues that the fact that the contract was dated "as of" January 15, 1985 is an indicia of guilty knowledge in the course of the contract formation. The government's claim is untenable. The evidence shows that January 1985 reflected the month in which REI had requested that GAI represent REI and REI had submitted the initial $10,000 and the

15th reflected the payment schedule for the retainer. [GEX 189; Tr. 358] Lyon testified that a contract is frequently executed on one date but is backdated to reflect when performance on the *592 contract actually began. [Tr. 992-93] The formal execution of the contract occurred six months after Gnau first met with Reedy.

3. Stature of GAI

The government also attempts to argue some type of inference of guilty knowledge by the purported fact of GAI's lack of stature as a consulting firm. In other words, the government attempts to create the impression that GAI was simply a "ghost firm" and that the Defendants accordingly must have known that GAI could have only been recommended by Voss for purposes of a kickback scheme. This inference is totally unsupported. The only evidence that the government offered in support of its theory was that GAI was a small three-man office headquartered in Bloomfield Hills, MI. This Court believes neither the size or the location of the firm is of significance one way or the other. The evidence in fact shows that GAI was a capable firm which presented a respectable client list to REI which included Ford Aerospace, [Tr. 620] Continental Airlines and Warner Amex Cable Communications, Inc. [RWR EX. 3]. Prior to the Gnau/Reedy meeting on October 12, 1984 Voss had briefed Gnau on the information and issues pertinent to REI to ensure that Gnau would have a "running start" in his sales efforts to REI. [Tr. 632, 698-700] Moreover, prior to REI's entering an agreement, Bray reported to Reedy that GAI's technical man, Marcus, was extremely conversant with the issues of OCR technology. [Tr. 1623] Finally, one of the reasons why REI hired GAI was precisely because GAI had political contacts which REI needed in order to open doors. For example, on January 8, 1985, Gnau wrote to Reedy stating that he had a meeting set up with PMG Carlin on January 11, 1985, and asking for confirmation of their consulting arrangement which was still unexecuted. [RR Ex. 30]

Moreover, as the relationship between GAI and REI developed and continued, GAI proved itself to be a hardworking

outfit on the technical issues. Accordingly this Court can find no rational nexus between the standing of GAI and the inference of guilty knowledge.

4. Knowledge of GAI/REI Contract by REI Management

The government also cites as evidence the fact that the Defendants kept key members of REI management out of the informational loop on the GAI/REI contract. The government contends that this is conduct of guilty knowledge because it demonstrates that the defendants were attempting to hide their illegal arrangement. After a full review of the evidence this Court finds this contention manifestly without merit.

The only evidence that the government presented was that John Lawrence, Chairman of the Board of REI at the time the GAI/REI contract was formed, was never informed of the contract and that Bray was not apprised of all of the details.

As to Bray being out of the loop, this Court cannot accept the government's contention that Bray's lack of knowledge of every detail supports the inference that the Defendants were nefariously attempting to hide things from him. Bray was extensively travelling abroad in the fall of 1984 in accordance with his duties as REI's Vice President of Distributor Sales. [Tr. 1547-48] Notwithstanding, the Defendants apprised Bray of a great deal of the operative facts. Bray testified that Reedy had apprised him a few days after the Labor Day weekend in September 1984 that Voss wanted to meet with Reedy. [Tr. 1176] After the Voss/Reedy meeting, Reedy told Bray the contents of that meeting, including the fact that upon Reedy's inquiry Voss recommended that REI hire GAI to promote its product before the USPS. [Tr. 1176-77] This meeting is a critical operative fact according to the government in terms of when the conspiracy was joined by the Defendants and it is accordingly ironic for the government to contend at the same time that the Defendants were keeping Bray out of the informational loop when Reedy apprised Bray of the substance of this meeting. Reedy also told ***593** Bray about his

October 12, 1984 meeting with Gnau and Reedy and Bray discussed whether Reedy planned on following up on the Voss recommendation of GAI. [Tr. 1185]

Bray was not told to keep the fact of the Reedy/Voss meeting or the GAI referral a secret. [Tr. 1614-15] Bray further disseminated news of the Reedy/Voss meeting to others within REI. [Tr. 1615] Reedy himself had also told Israel Sheinberg, REI's Executive Vice President and a member of the REI Board of Directors, and George O'Brien, REI's Vice President of Finance, of his meeting with Governor Voss at the Mansion in September 1984. [Tr. 3815-17]

Accordingly, the fact that the Lawrence did not know of the Voss/Reedy meeting cannot support a legitimate inference that the Defendants were hiding an illegal arrangement in light of the evidence that Reedy and Bray were freely and openly discussing the Reedy/Voss meeting with others in the Company.

5. "Our Friend"

Notwithstanding the entirely normal process by which the GAI/REI contract was formed, the government relies upon a vague and isolated exchange between Reedy and Gnau in the course of the formation of the contract from which, the government argues, guilty knowledge can be inferred. At the October 12, 1984 meeting between Reedy and Gnau at the Admiral's Club at the Dallas-Fort Worth Airport Reedy asked about Gnau's relationship with Voss. Gnau stated that it would be better that in the future they just referred to Voss as "our friend" to which Reedy replied he understood. [Tr. 296] The government contends that this comment evidences Reedy's guilty knowledge. This Court is unable to agree with the government because to do so would require that this Court analyze the exchange in a logical vacuum and not in the context in which the exchange occurred or, for that matter, in the context of the entire contract negotiations between REI and GAI.

In order for this Court to accord legitimate and rational inferences from the evidence to the government, a logical nexus must exist between the evidence and the inference to be drawn therefrom; otherwise, the inference is simply speculation. In the instant case there is no nexus between the Gnau/Reedy exchange and the inference of knowledge of the illegal gratuity scheme. This Court cannot ignore the total context of the six-month negotiation process in determining whether the inference of guilty knowledge to be drawn from the "our friend" exchange is rational and reasonable. Although Reedy told Bray about his meetings with Voss and Gnau, Bray testified that he was never told to refer to Voss as "our friend." [Tr. 1621] Standing alone the exchange is ambiguous and innocuous at best and when viewed in the perspective of the entire fall 1984 period it can hardly be viewed as evidence of guilty knowledge.

6. Other Isolated Indicia of Fraud

Although this Court can find no evidence that the Defendants joined a conspiracy during the period in which they entered a contract for consulting services with GAI, the government nonetheless points to "badges of fraud" which illustrate that the Defendants ultimately were aware of the payoff scheme between Voss and Gnau. This Court has fully and carefully considered all of the evidence that the government presents as indicia of guilty knowledge.

a. Entries in Moore Notebooks

The government has introduced statements that Moore wrote in his personal/professional notebooks in the course of telephone conversations that he had with Voss. For example, one entry provides "making sure each governor has the letter in their hands, already made moves to slow down, making point, taking heat, and working for you." [GEX 64] Another entry provides "the business to be had here is substantial." However, this Court is unable to draw any reasonable inference of guilty knowledge from these entries because the full context of these telephone

conversations is not before this Court where the government declined to call Voss ***594** as a witness. For example, this Court cannot even determine whether the entry of "the business to be had here is substantial" is a statement by Voss or by Moore. In the absence of context this Court cannot reach a reasonable inference as to the meaning of the statement. Moore could have written the statement simply as his own observation in reference to something Voss told him which, if known to this Court, would completely foreclose a reasonable inference of guilty knowledge. Any suggestion by the government that these statements are evidence of knowledge of the Voss/Gnau conspiracy is conjecture that should be precluded under the Rule 29 standard. [FN4]

FN4. The government also argues that this Court can reasonably infer guilty knowledge by the fact that after January 3, 1985 there is no record of telephone conversations between Voss and Moore. However, the significance of this lack of subsequent communication between Voss and Moore--at least according to the telephone logs in evidence--is dependent upon the substance of the telephone conversations prior to this date. Apart from the occasional innocuous comments that Moore recorded in his notebooks--as discussed above--this Court has no evidence of what substantive communications were made between Voss and Moore. Accordingly, this Court has no rational basis to reach an inference of any type on the meaning of the cessation of telephone contact between Voss and Moore.

b. May 24, 1985 Exchange Between Reedy and Gnau

On May 24, 1985, REI had made a presentation to the Technology Committee and various management personnel, including James V. Jellison, Senior Assistant PMG for Operations, in Dallas. [Tr. 1649] After the meeting Gnau and Reedy went off to another office. Gnau told Reedy that he thought REI was getting close to obtaining a contract. Reedy said he thought the Committee would recommend a sole source or add-on to the existing contract from what he had heard from Marcus. [Tr. 404] At that point Reedy asked what Gnau's arrangement was with Voss

to which Gnau answered it's better that Reedy not know. [Tr. 404]

The government contends that this exchange is indicia of Reedy's knowledge because it demonstrates that Reedy suspected that there was an arrangement between Voss and Gnau. This Court agrees with the government that Reedy may have suspected that something could be going on between Gnau and Voss and, arguably to his credit, made inquiries. The fact that Reedy entertained suspicions cannot be equated with a prima facie case of guilty knowledge and an intent to join a conspiracy in the absence of evidence of deliberate avoidance. Although an individual clearly cannot avoid participation in a conspiracy by knowingly avoiding or ignoring illegal wrongdoing, the law conversely does not charge that private individuals must conduct independent investigations of their business associates.

There is no context in which this Court can determine what is a reasonable inference of the meaning of this exchange. Gnau specifically testified that he could not recall the "proper context" or the "lead-up statement" in which Reedy's question arose and accordingly any attempt by this Court to infer a meaning would be speculation. [Tr. 404] After Gnau testified that he could not recall the context of the exchange he immediately offered the testimony that he never told Reedy that Voss was on the payroll or that he was compensating him in any way. [Tr. 405]

c. August 29, 1985 Meeting Between REI and GAI

On August 29, 1985, Gnau, Marcus and Spartin met at REI with Reedy, Bray, Phil Colquhoun and, for a time, Jenny Barker. [Tr. 454, 1331, 2445] One of the topics discussed was GAI's request for more money for its consulting services to REI. Gnau stated that his firm had been working on behalf of REI for the last eight months and that the original $30,000 retainer, paid in equal installments over the first three months, was exhausted and the expense reimbursement was inadequate to even cover office overhead. Gnau stated that unless his firm received

additional retainer payments to provide current cash flow GAI would no longer be able to represent REI. [Tr. 1337, 1691-92, 2023] In response, Reedy agreed that GAI should ***595** receive additional money and recognized that GAI had people to take care of. [Tr. 455]

The government argues that the reasonable inference in favor of the government to be drawn from Reedy's recognition that Gnau had people to take care of is that Reedy was aware of Gnau's illegal payments to Voss. However, to accept this argument would be to again ignore the context in which the statement was made. This statement arose directly out of Gnau's representations that he and Marcus were virtually working fulltime on behalf of REI but no longer had the money to even pay their overhead.

The innocuousness of this statement is further confirmed by the fact that not only is the request for an additional retainer premised upon the plausible ground that GAI's efforts on behalf of REI had depleted its cash resources, but Reedy actually bargained with Gnau on the financial package that REI was willing to provide Gnau with to cover his cash flow problems. Reedy told Gnau that REI would not be willing to pay GAI's requested $30,000 fee and eventually agreed to pay only $14,000 a month for GAI's consulting services which was to be deductible against the 1% contingency fee if it was ever earned. REI further agreed to pay GAI $6,000 a month for the public relations work that was formerly done for REI by Hill & Knowlton. Finally, REI put a cap of $2,000 on GAI's expenses because REI found GAI's past expense vouchers to be too high. [Tr. 455, 1695] The contract was consequently formally amended to reflect these new terms. [GEX 381] The evidence reflects that the negotiations were subject to the same hard-driving business considerations as any of the Company's other contracts.

The government's argument that the request for an additional retainer and the subsequent negotiations between Reedy and Gnau were simply contrivances is unsupported. The evidence also shows that the unindicted coconspirators were not shy among

each other on the discussion of their earnings from their scheme. But there is no evidence that the Defendants were involved in these discussions.

7. Reedy's Deception to Postal Inspection Service

The government cites as evidence of coverup of the Gnau/Voss conspiracy, and hence guilty knowledge, the fact that on April 8, 1986, Reedy lied to Postal Inspectors when they asked who recommended GAI to REI. Reedy told the Inspectors that Bob John Robison, an REI lobbyist with Hill & Knowlton, had apprised REI of GAI. [Tr. 3352-53] The next time that Reedy met with Inspector Edwards he apologized for lying and told the Inspectors that Voss had referred REI to GAI. [Tr. 3366]

At the meeting in which Reedy lied to the Inspectors, Reedy and Thomas A. Loose, REI's general counsel, had told the Inspectors that they were upset with the Inspectors' "heavy handed treatment" of Bray earlier that day. Inspector Edwards had raised his voice with Bray and "pretty forcefully" told him that the Inspectors were investigating charges of bribery and conspiracy and that people would be going to jail and that Bray should get on the bus before it left the station. [Tr. 3346, 3348-50, 3363] Inspector Harrington, the second in command in the Inspection Service and a veteran of thirty-two years, testified that Inspector Edward's conduct was unsuitable. [Tr. 3446, 3467]

Reedy and Loose also told the Inspectors that they were suspicious of the Inspectors' motives for being at REI because on a prior occasion in 1979 the Inspection Service had frustrated REI's ability to compete in a procurement where it had subpoenaed REI's records and then later returned them without comment or action. [Tr. 3351-53] Inspector Edwards testified that Reedy and Loose were charging that "this current investigation was ... a contrivance to set up because REI was right on the verge of delivering a machine out in Phoenix to be tested.... So there was a feeling that we were there, in some way, to preclude REI from competing." [Tr. 3352, 3364-65] Inspector Edwards testified that

*596 Reedy and Bray asked to whom the Inspectors reported and about the independence of their office. [Tr. 3353]

Regardless of the reason why Reedy lied to the Postal Inspectors, this lie alone could not support a prima facie case of guilt beyond a reasonable doubt. The Rule 29 standard is not simply whether there are instances of evidence in the government's case which on their own may reasonably support an inference of guilt but whether all those inferences constitute "evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Curley, 160 F.2d at 232-33. Although the government culled its case-- presented over the course of six weeks--for evidence upon which reasonable inferences of guilty knowledge could be reached, the government was unable to show that these inferences in total were sufficient to meet its burden of proof on a prima facie case, especially where this Court must reject some of the government's evidence as speculative or innocuous under the Rule 29 standard.

8. Total Failure of Direct Evidence Against Defendants

There is a complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme. All of the unindicted coconspirators who testified expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss. [Tr. 306, 405, 562, 817, 2049, 2657, 2706] The government contends that the Court should not hold it to the burden of proving its case with direct evidence because in business fraud and conspiracy cases the evidence will generally be circumstantial due to the need for secrecy if the criminal venture is to be successful. This Court recognizes that knowledge is difficult to prove. See United States v. Hooks, 848 F.2d 785, 793 (7th Cir.1988) ("Because a conspiracy is by nature secret, its existence and common purpose must often be proved by circumstantial evidence."); United States v. Redwine, 715 F.2d 315, 320 (7th Cir.1983), cert. denied, 467 U.S. 1216, 104 S.Ct. 2661, 81 L.Ed.2d 367 (1984) ("The government need not establish that there existed a formal agreement to conspire; circumstantial

evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct may serve as proof."). However, this difficulty can in no way lower the standard of proof which this Court must hold the government to in establishing its prima facie case against the Defendants.

The conspiracy which in fact existed between Voss, Gnau, Spartin and Marcus was well-documented with direct evidence. These men openly discussed their illegal activity among themselves. The unindicted conspirators had even sought the advice of counsel on how to proceed with the distribution of their ill-gotten gains from the conspiracy and in fact reduced their distribution arrangement to writing. [Tr. 679-681, 1749] However, there is no evidence that the Defendants were ever included in a discussion of the conspiracy.

In late April or early May 1986, when Reedy and Bray were in Phoenix for purposes of preparing the site for the MLOCR test model, Reedy asked Gnau while in a restaurant whether Gnau had made any payments to anyone. Gnau answered "absolutely not" and explained that he had simply loaned Voss some money because Voss was having financial problems in connection with his divorce. [Tr. 561, 1807] Gnau assured Reedy and Bray that he had done nothing illegal. [Tr. 1807] Gnau testified at trial that he directly lied to Reedy and Bray "[b]ecause I did not want Mr. Reedy or Bray to know I had Mr. Voss on the payroll." [Tr. 562] Gnau testified that he wanted to continue receiving payments from REI and that if he admitted his own culpability in the scheme REI would terminate the relationship with GAI. [Tr. 691, 769]

B. Spartin Personnel Scheme

The government contends that the Defendants conspired to defraud the United States government through the use of Spartin to effectuate personnel changes in the USPS. Although Spartin was President of GAI which was representing REI ***597** before the USPS, Spartin at the same time was a managing partner of MSL,

a search firm that was a subsidiary of Hay & Associates, with whom the USPS had contracted for executive search services. The Spartin personnel search prong of this conspiracy falls because the evidence before this Court fails to show that REI believed that the USPS did not know of Spartin's dual role. Rather, much of the evidence reflects that the Defendants had good reason to believe that Spartin's role with GAI as an REI advocate was open to the world in general and to the USPS in particular.

1. Lack of Direct Evidence

None of the unindicted coconspirators testified that they told any of the Defendants that Spartin's role with GAI and REI was a secret which could not be disclosed. Bray specifically testified that he was not told to conceal Spartin's GAI and REI role by either the Defendants or the unindicted coconspirators. [Tr. 1641]

2. March 5, 1985 Meeting in Lobby

After the March 5, 1985 meeting between REI and the Technology Committee in Washington, D.C., Gnau and Marcus introduced Spartin to Reedy and Bray as GAI's Washington Associate in the lobby of the Postal Headquarters in Washington, D.C. Spartin then spotted Governor John R. McKean, Chairman of the Board of Governors of the USPS, in the lobby. In an effort to impress REI with his contacts, Spartin walked directly over and greeted McKean. [Tr. 2397, 2667-68] Spartin returned to the GAI/REI group and they all proceeded to lunch in a public dining room at the Loew's L'Enfant Hotel which was located directly across the street from USPS headquarters. [Tr. 2398, 2666]

3. March 12, 1985 Letter

On March 12, 1985--one week after REI and GAI had met with the Technology Committee and Deputy PMG Jackie A. Strange--Marcus sent a letter to Governor Ruth O. Peters, Chairperson of the Technology Committee, with copies to Strange

and Camp, on GAI letterhead. [GEX 206] The letterhead showed in red ink that Spartin was the President of GAI. [Tr. 727-28, 730-31]

Strange responded to the letter in a memo to Peters. [GEX 209] Strange attached the March 12 GAI letter showing Spartin as President to her memo and circulated it to Peters, Voss, Camp, Harris and Jellison. [GEX 209; Tr. 3177] Further, the same March 12 letter was apparently recirculated within the USPS in December 1985. [See WGM EX. 16 (March 12 letter bearing December received stamp).

The government characterizes this as a mistake in the conspiracy. There is no evidence that the Defendants had reason to believe that the transmittal of this letter was a mistake. None of the unindicted coconspirators testified that they apprised the Defendants that the March 12, 1985 letter to the USPS was a mistake. Bray testified that REI knew that such letterhead--if not the March 12, 1985 letter specifically--had been sent to the USPS. [Tr. 1464, 1467]

When David Harris, Secretary of the Board of Governors, rediscovered the March 12, 1985 letter in his files on February 12, 1986, Harris wrote a memorandum expressly concluding that based on this letter "[i]t's obvious that management knows of the Spartin/Gnau/REI connection. Jackie's memo went to Jellison and he can add stuff together." [GEX 552; Tr. 3185] Harris further testified that given the fact that Spartin's name was listed on the letterhead as President of GAI he believed that "management knows, or had reason to know I should have said. I just assumed that they did." [Tr. 3186] Furthermore, at the March 3, 1986 meeting at which the Board terminated Spartin's contract with the USPS, Governor Tyler McConnel, a new member of the Board and an attorney, stated that with Spartin's name on the letterhead it would be difficult to argue that the recipients of that letter were not on notice of his identity with GAI: "when it's on the stationary it's pretty hard to say he didn't disclose it. I mean, that is somewhat wishful thinking, to think we can claim we didn't

know it. I mean, unless you believe *598 the Mein Kamp theory, that the truth is big enough that we disbelieve. It was on their stationary. If we don't bother to read it, it's not like a firm--with all due respect, it's not like a long list of people at a law firm." [Tr. 2998; RWR EX. 180]

4. Spartin's GAI Office

Spartin's Washington, D.C. office at 1250 I Street was clearly identified as affiliated with GAI. On the wall behind the receptionist was a GAI sign in letters a foot high alongside a sign in smaller letters for Miner & Fraser. [Tr. 3231]

Moore and Reedy saw this office for the first time on March 27, 1985. [Tr. 2409] Members of the USPS management had also visited Spartin's office where the GAI sign was prominently displayed. Jackie Strange had visited the office on prior occasions [Tr. 2672] and on December 27 or 28, 1985, David Harris visited the office for an interview with Spartin for the PMG position. [Tr. 3171] Harris testified that he specifically noticed that the suite in which he was meeting Spartin was also used by GAI and that he knew GAI was an REI representative. [Tr. 3231] Harris testified that he "had an uneasy feeling that something was funny" [Tr. 3234-35] and, in response to his concerns, outside counsel for the Board of Governors investigated Spartin's association with Gnau which appears to have been commenced prior to the end of 1985. [Tr. 2957-59; RWR EX. 181]

5. Responsibility of USPS

Bray testified that he assumed that the USPS would in fact have investigated Spartin for conflicts of interest before hiring him. [Tr. 1642] Moreover, there is evidence that the issue of conflicts is not a particularly troubling issue for the USPS. For example, when the USPS searched for a public accounting firm to monitor the OCR procurement it approached the firm of Price Waterhouse. Price Waterhouse disclosed that it represented and audited REI and

that it accordingly had a conflict of interest. Notwithstanding, the USPS was willing to consider Price Waterhouse. However, in the interest of maintaining the appearance of its independence, Price Waterhouse declined to continue with the prospect of representing the USPS.

This Court of course understands that it is the intent of the parties to defraud which governs and that fraud cannot be excused simply because the purported victim was in a position to prevent it. However, this Court brings out the above evidence to demonstrate precisely why in this context the inference that the Defendants had the intent to hide their association with Spartin is unreasonable.

6. Spartin's Absence From USPS Meetings

The government argues that this Court can infer that REI knew that Spartin's role as GAI was being withheld on the fact that Spartin did not attend the March 5, 1985 Technology Committee meeting or other USPS meetings with REI. This Court cannot find a reasonable inference of guilty knowledge based on this fact where there is no evidence that Spartin had any technical expertise for which his presence at USPS meetings would have been useful or necessary. As Spartin candidly apprised Moore and Reedy, he was not technically competent. [Tr. 2411] Rather, Spartin told Reedy and Moore that his role would as a strategizer and political operative. Spartin was not shy in emphasizing his White House background and political access to PMG Carlin and Governors McKean and Voss. [Tr. 1223, 2411]

7. Transfers and Removals of Jellison, Strange and Carlin

In connection with attempting to establish that the Defendants were aware of the Voss/Gnau payoff scheme and the Spartin personnel scheme, the government cites as evidence the fact that Jellison, Strange and Carlin were transferred or removed from their positions within the USPS. However, this Court can make no inference of guilty knowledge on the basis of these

operative facts where the government provided no evidence that these individuals were in fact removed by the unindicted coconspirators in furtherance of the conspiracy. The only ***599** evidence in this record is that Jellison, Strange and Carlin were fired for reasons independent of the conspiracy and by individuals other than the coconspirators.

Carlin testified that he was the one responsible as the PMG for removing both Jellison and Strange from the OCR procurement. Carlin testified that he ordered Jellison removed on July 12, 1985 because he was not responsive to the Board of Governors' mid-course correction to convert to multiline technology. [Tr. 2111, 2213] When Albert V. Casey became PMG, he testified that he needed to transfer Jellison out of his new position because he "had heard from McKean, from Ruth Peters, from Griesemer, from Voss, from everybody, that the Jellison situation was intolerable and wasn't working, and that he was not a reliable source of information to the board." [Tr. 3119] Although Casey offered Jellison a transfer to a position in Chicago, Jellison declined and resigned. [Tr. 3153-54]

As to Strange, Carlin testified that he had to remove her from OCR procurement because she had lost her effectiveness due to the intense public criticism and wanted to take her out of the line of fire.

Accordingly, the only rational inference that this Court can make from the removals of Jellison and Strange is that in order to effectuate the Board's midcourse correction mandate Carlin had to remove them from the OCR procurement.

The evidence shows that the Board of Governors unanimously voted to remove Carlin on January 6, 1986 because they were not satisfied with his performance. [Tr. 2979-80, 2988, 2991] The government has presented no evidence that the entire Board of Governors was involved in a conspiracy to remove Carlin or that any of the unindicted coconspirators exercised whatever influence they had over the Board of Governors to cause each of

them to vote for Carlin's removal. For the government to suggest that the Board of Governors was simply an unwitting puppet of the conspiracy whose strings were pulled by Voss is, frankly, unreasonable and unsupported by the evidence. For example, Governor McKean told Spartin that he had been receiving reports from DPMG Strange and other Governors that Carlin's performance was not satisfactory. [Tr. 2473] McKean testified that after the completion of a number of interviews with regional PMGs who were critical of Carlin he determined that Carlin was simply not the right man for the USPS. [Tr. 2926- 28] Spartin advised McKean to give Carlin a performance review and the opportunity to correct any problems that the USPS had with Carlin. [Tr. 2473, 2926-27]

On December 2, 1985, the Board of Governors met and discussed their dissatisfaction with Carlin's performance as Postmaster General. [Tr. 2927-28] McKean--not Voss--brought out the issue of Carlin's potential termination. Other Governors expressed their criticisms of Carlin and Governor Griesemer stated that he had actually discussed with Carlin his management and leadership problems. [Tr. 2928-29]

At the end of the Board of Governors meeting the Board resolved to send a Committee to talk with Carlin about his problems. [Tr. 2929] Governor Ryan acted as the spokesman for the group which also included McKean and Voss. [Tr. 2929] Voss only stayed for a few minutes. [Tr. 2138] Ryan told Carlin that not only was there criticism of his leadership but it was coming from those who should have been loyal to him. [Tr. 2930] Carlin appeared totally surprised about the criticism and offered no effective response. [Tr. 2930-31] McKean decided at that point that a decision had to be made about Carlin in the near future [Tr. 2931] and subsequently informed Spartin, although not yet hiring him, to begin to "keep his eyes open" for a replacement for Carlin. [Tr. 2933]

The government argues that the Defendants viewed Carlin and Jellison as "obstacles" to an REI contract with the USPS for

MLOCRs on a sole source basis. [Tr. 1342] Bray testified that Carlin was opposed to REI receiving a sole source contract although it was the only company which had the technology to immediately meet the multiline needs of the USPS. [Tr. 1341] Moreover, Jellison told Reedy "that *600 Recognition Equipment would never get a Postal procurement while he was the head of Postal Service operations." [Tr. 1759] In November 1985, Moore directly stated to the Postal Inspection Service that "the Postmaster General is standing in the way of the multiline procurement matter." [Tr. 3336, 3383-84]

To the extent the Defendants had any role in the removal of Jellison, Strange and Carlin it was through Defendants' public criticism of USPS management to the Board of Governors, the United States Congress and the media. Carlin, Jellison and Strange were public employees and REI, as a taxpaying member of the American public, was entitled to criticize--and criticize hard--what it viewed to be the ineffective policy of USPS management in the OCR debate. The Defendants were entitled to tell the world that they viewed Carlin, Jellison and Strange as obstacles not only to REI but to the USPS itself. There is simply no reasonable inference of a conspiratorial or illegal link between the Defendants' motivation to get rid of Jellison and Carlin and the fact of their removal.

8. The PMG Search

Spartin ultimately received the formal go ahead to look for a candidate to replace Carlin as the PMG. The government contends that the fact that Spartin ultimately contacted the Defendants for suggestions on who would be a candidate for the PMG position is evidence that the Defendants knew of and were involved with Spartin's conflict of interest. There is no doubt that the Defendants knew of Spartin's dual role, but the question begged is whether the Defendants believed that the USPS knew of Spartin's conflict of interest as well. As extensively discussed in the above sections of this Memorandum Opinion and Order, the record is replete with evidence that suggests that REI believed that

the USPS knew of Spartin's roles with both GAI and MSL.

The operative fact that Moore was contacted by Spartin for his recommendations for the PMG of the USPS cannot support a rational inference that the Defendants were aware that Spartin was not disclosing his role with GAI to the USPS. REI is a significant American corporation with business before the USPS and it presumably understood the needs of the agency and the type of candidate that it required as its PMG. The fact is that often the best sources of candidates for a position in an agency are precisely those who appear before that agency. Accordingly, Moore recommended three preeminent men in American business and industry to Spartin whom Moore knew either professionally or civically: Albert V. Casey, the former Chairman of American Airlines [Tr. 3090]; Chester Nimitz, former Admiral of the United States Navy and Chairman of the Board and Chief Executive Officer of the Perkin-Elmer Corporation [Tr. 737]; and John Lawrence, former Chairman of the Board of REI and Dresser Industries. [Tr. 1511] This Court cannot understand how it can make an adverse inference from that fact that Moore was requested by Spartin to make recommendations when there is no record evidence that Moore had any reason to believe that the Board of Governors, which had the responsibility for appointing the PMG, would not exercise its responsibility independently. The inference that the act of recommending a candidate for PMG is tantamount to taking over the personnel decisionmaking process of the Board of Governors is not supported by the evidence. The record before this Court demonstrates that the Board of Governors was pleased with the recommendation of Casey [Tr. 2503] and acted quickly to appoint him by a unanimous decision.

There is no evidence that Moore tried to hide the fact that he recommended Casey to Spartin for the position of PMG. When Moore, upon Spartin's urging, called Casey to measure his interest in becoming PMG, Moore never told or asked Casey to keep this conversation a secret or confidential. [Tr. 3155] Casey recalls confronting McKean in March 1986 and telling him that he had told McKean back in January of his acquaintance with Moore

concerning this matter. [Tr. 3146]

When Spartin boasted of his role in putting Casey into the position of PMG at the ***601** January 9, 1986 dinner at the Madison Hotel, Spartin testified at trial that Moore made a comment in substance that "I know Mr. Casey--I know he is an honest man, a smart man. He will do the right thing." [Tr. 2515] This evidence does not support a reasonable inference that Moore anticipated any favors from Casey as a result of Casey's recommendation and appointment to the position of PMG.

9. Moore Coverup of Spartin's Conflict of Interest

The government contends that a legitimate inference can be raised that Moore knew that the USPS was unaware of Spartin's association with REI because Spartin testified that Moore agreed to tell the Postal Service that it was Moore who had contacted Spartin with the Postmaster General recommendations. Even assuming that Moore in fact agreed to change the story of the manner in which Spartin learned of the recommendations, [FN5] this cannot support an inference of an intent to keep his relationship with Spartin a secret because it in fact directly demonstrates that he had a relationship with Spartin.

FN5. In a polygraph examination that Spartin underwent for the Postal Inspection Service Spartin expressly denied that Moore--or anyone else at REI--had agreed to participate in any of Spartin's efforts to hide his own conduct. [Tr. 2627]

Subsequent to Spartin's request that Moore tell anyone who inquires that it was Moore who contacted Spartin with names of Postmaster General candidates, Moore consistently expressed his concerns to others that Spartin was trying to engage Moore in some type of coverup which he did not understand. For example, when Moore and Reedy had lunch with Gnau at the Maison Blanche in Washington, D.C. on April 14, 1986, Moore said that their attorneys were concerned about the meeting because of the ongoing investigation but he and Reedy were not doing anything

wrong and simply wanted to determine what had really been happening between Voss, Gnau and Spartin. [Tr. 547] Moore told Gnau that he was very concerned about Spartin trying to involve him in an effort to change the facts. [Tr. 548, 552-53] A month later Moore again told Gnau while attending a reception on the White House lawn that he was concerned that Spartin was trying to involve Moore in some type of coverup. [Tr. 553] Gnau testified that he did not have the impression that Moore participated in a coverup but only that Spartin was attempting to involve Moore. [Tr. 553]

III. Theft Count and Receipt of Stolen Property Count

Count Two charges the Defendants with theft of property used by the USPS with a value in excess of $100 in violation of 18 U.S.C. s 1702. Count Three charges the Defendants with receipt of stolen property with a value in excess of $250 in violation of 22 D.C.Code s 3832. The basis of these counts is a copy of a twenty-page brochure that ElectroCom Automation (ECA), REI's competitor which had obtained awards from the USPS for singleline OCRs, provided to the USPS in connection with its November 4, 1985 presentation to Postal Service management and the Technology Committee and that Governor Voss immediately afterwards gave to Marcus, the technical consultant at GAI.

The government has conceded that these counts "cannot stand alone without the conspiracy count." [Tr. 4130] Notwithstanding this concession, this Court notes that even if the conspiracy count survived the Defendants' motion this Court would still grant the Defendants' Rule 29 motion as to counts two and three on the grounds that the government has failed to establish a prima facie case of the jurisdictional value of the ECA brochure.

The government has presented evidence of the jurisdictional value based solely on the cost of the formal preparation of the document. The cost-of-production approach to value is skeptically viewed by courts as a reliable method, see, e.g., United States v. Whetzel, 589 F.2d 707, 710-11

(D.C.Cir.1978); Lund v. Commonwealth of Virginia, 217 Va. 688, 232 S.E.2d 745 (1977), and even when cost-of-production is accepted as a means for determining value it has been only where other substantial ***602** evidence exists indicating the value of the stolen property. See, e.g., United States v. Drebin, 557 F.2d 1316 (9th Cir.1977), cert. denied, 436 U.S. 904, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1978). The government has cited to this Court no decision in which cost of production alone has been be used as a means to determine jurisdictional value. This Court cannot accept the government's cost-of-production approach where it has presented no evidence upon which this Court can reasonably infer that there is a rational nexus between the cost of producing the document and the value of the knowledge contained therein.

ECA had been told not to include competitively sensitive information in its presentation. [Tr. 10-11] Although Robert C. Buzard, the President and CEO of ECA, testified that the "market value of the information ... [was] enormous" [Tr. 2345] he provided no basis upon which he reached this conclusion and the only specific information that Buzard claimed was proprietary was that his company's updated SLOCR machines performed 17% better than its prior model. [Tr. 2342] However, testimony in the Congressional Record for October 23, 1985 disclosed that the performance increase for the ECA's updated SLOCR was 15%. [Tr. 2279] There was no evidence suggesting that knowledge of the 2% difference between the Congressional Record information and the ECA brochure information was of a materiality to reach the jurisdictional values except for Buzard's general testimony that it was "a piece of information that has a big competitive value." [Tr. 2346] Marcus testified that the document was "not anything substantive" [Tr. 2040] and that when he received the brochure he thumbed through it and called it a "PR piece" [Tr. 2039-40]

IV. Wire and Mail Fraud Counts

The government also concedes that if the conspiracy count does not survive the Defendants' Rule 29 motion then the wire and mail fraud counts must also fail because, as the government

concisely stated, "the conspiracy count and the mail and wire fraud scheme track each other," and the government has presented no evidence independent of the conspiracy against the Defendants which would support a conviction under the wire and mail fraud statutes. [Tr. 4160]

V. Conclusion

After a full and hard review of the government's evidence presented over a six-week period there is no legitimate or reasonable inference, even when viewed in the light most favorable to the government, that the Defendants knew beyond a reasonable doubt of any conspiracy to defraud the United States Government and the United States Postal Service in violation of 18 U.S.C. s 371.

Accordingly, it is hereby

ORDERED that the Defendants' joint motion for judgment of acquittal is GRANTED to all Defendants and on all counts.

ORDER

This matter is before the Court pursuant to the Defendants' joint motion to dismiss the indictment with prejudice due to prosecutorial misconduct. In light of this Court's November 20, 1989 Memorandum Opinion and Order granting Defendants' joint motion for judgment of acquittal it is hereby

ORDERED that the Defendants' motion to dismiss the indictment is DENIED as moot.

(2)

Supreme Court, U.S.
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No. 95-2005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the decision below, a unanimous panel of the D.C. Circuit held, *inter alia*, that prosecutors are not absolutely immune from suit for coercing witnesses into testifying falsely or for disclosing grand jury testimony to unauthorized individuals. This decision does not make new law. It simply applies this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), to the facts of this case. Since the decision below is also consistent with the only other appellate decision applying *Buckley* to analogous facts, this

case does not warrant this Court's review. The petition should therefore be denied.

STATEMENT

Because the petition addresses the question of official immunity, a threshold issue normally decided on the basis of the pleadings, the facts asserted by respondent must be taken as true. *See Buckley*, 509 U.S. at 261. Those facts are as follows:

The Conspiracy Prosecution — Respondent William G. Moore, Jr. is a former Chief Executive Officer of Recognition Equipment Incorporated ("REI"). (Pet. 56a). Prior to Moore's arrival in 1982, REI was struggling. Within a year, under Moore's direction, the company prospered. By 1986, REI had reached $241.8 million in revenues and was widely considered one of the most dynamic and successful publicly-held corporations in the Dallas area. As a result of this success, Moore was named Dallas Business Man of the Year. Moore also served on Georgetown University's Board of Regents, on the President's Advisory Committee for Trade Negotiations, and on the boards of several charitable organizations. (*Id.*; Resp. App. 16a).

In the mid-1980s, REI developed a multi-line optical character reading machine. The company believed that this machine could materially speed up the processing of mail, thereby saving the United States Postal Service (USPS) millions of dollars per year. (Pet. 56a, 76a). The postal service, however, chose to employ a single-line technology, which, unlike REI's multi-line technology, was dependent upon public use of nine-digit zip codes. This decision, ultimately reversed, became the center of a divisive public debate involving congressional inquiries and broad media exposure. (*Id.* at 56a-57a, 76a). At the center of this controversy was Moore, who sharply criticized USPS procurement practices both publicly and to members of Congress. (*Id.* at 57a). Not surprisingly, these criticisms made Moore many enemies at the postal service. (*Id.* at 17a, 66a).

In the course of his campaign to convince the postal service to use multi-line readers, Moore and REI engaged, at the

suggestion of a member of the Board of Governors of the USPS, the services of a public relations and consulting firm. (Pet. 57a, 75a-76a). Unbeknownst to Moore and REI, the firm was engaged in a kickback scheme in which the firm paid a member of the USPS board for referring clients to the firm and for providing contracts to the firm's clients. (*Id.* at 74a-75a). All the participants denied that Moore knew of the scheme, and none of the thousands of documents reviewed during the postal service's investigation suggested otherwise. (*Id.* at 58a, 87a). Nevertheless, on October 6, 1988, Moore, another REI official, and REI itself were indicted for participating in the kickback scheme as well as for conspiring to influence the selection of a Postmaster General who favored multi-line readers. (*Id.* at 55a, 70a-74a, 88a-89a).

At trial, the government presented its case for more than five weeks. When the government rested, Moore and the other defendants moved for a judgment of acquittal. In granting the motion (Pet. 69a-100a), Judge Revercomb took the unusual step of reading his lengthy decision in open court. In his view, the government not only failed to make out a prima facie case of conspiracy; in many instances, the evidence presented was "exculpatory and point[ed] toward the innocent conduct of the Defendants." (*Id.* at 70a-71a).

Despite his acquittal, Moore suffered grievous injury from the government's investigation, the indictment, and trial. As a result of the indictment, REI was debarred from government contracting, which sent the company's stock plummeting. This decline caused Moore, who owned more than 100,000 shares in the company and had options for still more, "catastrophic financial injury." (Pet. 55a, 62a, 66a). The indictment also damaged Moore's reputation, forcing him to resign from the boards on which he served and preventing him from finding comparable employment for many years after a hostile takeover at REI. (*Id.* at 62a, 66a). The investigation, indictment, and trial also exacted a physical and emotional toll on Moore, who at one point suffered what doctors in the Parklane Hospital emergency room diagnosed as acute stress reaction. (*Id.* at 66a-67a).

The OPR Investigation — At trial, Moore moved to dismiss the indictment on grounds of prosecutorial misconduct. Because the government presented insufficient evidence at trial, the district court did not reach the motion. (Pet. 100a). Accordingly, after trial, counsel for the defense (Robert Bennett, Jack Cooney, Marshall Searcy, and Charles Stillman — all former Assistant United States Attorneys) asked the Department of Justice's Office of Professional Responsibility (OPR) to investigate the behavior of the prosecutor, petitioner Joseph A. Valder. (Resp. App. 3a-5a). OPR acknowledged that Valder had prevented witnesses from telling the grand jury that Moore was unaware of the kickback scheme, and that Valder had asked these witnesses leading questions to "which he should have known rested upon a faulty premise." (*Id.* at 6a-7a, 8a-9a). OPR conceded as well that Valder had threatened one witness by tearing up his non-prosecution letter, withheld a transcript from a polygraph examination in which the same witness repeatedly denied any knowledge that Moore was aware of the kickback scheme, and disclosed grand jury testimony to unauthorized persons. (*Id.* at 7a-11a). Nevertheless, OPR refused to recommend any disciplinary action. (*Id.* at 12a-15a).[1]

The Claims Below — Approximately four months after OPR closed its investigation, Moore sued Valder and six postal inspectors. The complaint (Pet. 53a-68a) alleged that the defendants violated his constitutional rights by, among other things, retaliating against him for his criticisms of the postal service. Indeed, Valder and the postal inspectors decided to "get" Moore even though every admitted participant in the kickback scheme had told them that Moore was not aware of the scheme

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[1] This refusal is particularly troubling in light of Valder's admitted disinterest in Moore's guilt or innocence. According to the uncontroverted affidavit of a grand jury witness (Resp. App. 17a-20a), Valder stated that "whether the persons involved [in this case] were guilty or not did not concern him." Moore's prosecution was only important to Valder "to get a track record or some notoriety which would help him obtain a good position in private practice." (*Id.* at 19a).

and that the participants had, in fact, attempted to conceal the conspiracy from him. (*Id.* at 58a). In so doing, Valder engaged in a shocking array of prosecutorial misconduct.

In order to obtain Moore's indictment, Valder deliberately concealed from the grand jury the fact that Moore was unaware of the kickback scheme. (Pet. 58a-62a). Rather than permitting witnesses who had informed Valder that Moore had no knowledge of the scheme to testify freely, Valder and the postal inspectors prepared statements summarizing their testimony, which were for the most part presented to the grand jury in lieu of live testimony. (*Id.* at 59a-60a). In this fashion, Valder was able to create the false impression that Moore must have known about the conspiracy through the very witnesses who were prepared to testify that Moore had no knowledge of the kickback scheme and that they had in fact disguised the scheme from him.

In addition to suppressing evidence of Moore's innocence, Valder also fabricated evidence of Moore's guilt. William Spartin was the president of the consulting firm at the center of the kickback scheme. Granted immunity in exchange for his testimony, Spartin was to have been the government's star witness against Moore. (Pet. 57a-58a). Spartin, however, told Valder and the postal inspectors that neither he nor anyone else had informed Moore of the kickback scheme. (*Id.* at 61a). In fact, in a polygraph examination conducted nearly two years before Moore's indictment -- despite repeated attempts by the examiner to trick him into incriminating Moore -- Spartin stated no less than nineteen times that Moore and his co-defendants were not, to his knowledge, aware of the kickbacks. (Resp. App. 22a-27a). Moreover, these denials occurred in spite of repeated attempts to "spin" Spartin into incriminating Moore.

At one point, Valder and the postal inspectors staged a pre-planned outburst designed to intimidate Spartin, who had a heart condition and was undergoing psychiatric treatment. During an interrogation of Spartin, while postal inspectors surrounded Spartin, Valder accused him of hiding Moore's involvement and then, for dramatic effect, tore up Spartin's immunity letter. (*Id.*).

At another point, Valder issued a subpoena for Spartin's son and threatened to prosecute the son for obstruction of justice. (*Id.*).[2] In addition, in clear violation of the Federal Rules of Criminal Procedure, Valder disclosed to Spartin testimony given before the grand jury by other witnesses, testimony that, as mentioned above, had been carefully drafted by Valder and the postal inspectors to give the impression that Moore had knowledge of the kickback scheme. (*Id.* at 61a).[3]

In addition to attempting to intimidate Spartin into incriminating Moore, Valder also attempted to coerce Frank Bray, a former REI executive, into giving false testimony. Bray, like Spartin, had told Valder that Moore was not aware of the kickback scheme. Nevertheless, in July 1987, more than a year before Moore was indicted, petitioner asked Bray to sign a witness statement indicating that Moore knew of the kickback scheme. (Pet. 60a). Valder then informed Bray that if he did not accept the statement as drafted, he would have to testify before the grand jury for five to seven days or "however long it took." (Resp. App. 21a). Nevertheless, Bray and his attorney Ellen Huvelle (now a Judge of the Superior Court of the District of Columbia) insisted that a paragraph be added reflecting that Moore had no knowledge of the kickback scheme. Valder refused to permit the paragraph, but promised that if Bray signed the proposed statement, he would be permitted to testify orally that Moore had no knowledge of the kickback scheme. (Pet. 60a).

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[2] The threats against Spartin's son are vividly described in the transcript of Spartin's polygraph examination. (Resp. App. 22a-27a).

[3] Petitioner also disclosed grand jury testimony (and a draft indictment) to former Postmaster General Paul Carlin in an apparent attempt to influence a multi-million dollar private civil lawsuit Carlin had filed against Moore. (Pet. 61a).

When, however, Bray came before the grand jury, Valder reneged on his promise. (*Id.*).[4]

The Decision Below — Moore initially brought his claims against petitioner and various postal inspectors in the United States District Court for the Northern District of Texas. (Pet. 53a-68a). Once administrative procedures were exhausted, Moore brought claims against the United States under the Federal Torts Claim Act, 28 U.S.C. §§ 2671-80, in the same venue. The district court in Texas dismissed many of these claims, including all those against Valder, and transferred the rest to the District Court for the District of Columbia. (*Id.* at 41a-52a). Following transfer, the cases were consolidated, and the remaining defendants renewed their motion to dismiss. In a decision dated September 24, 1993, the District of Columbia court granted the motion. (*Id.* at 23a-40a).

On September 22, 1995, a unanimous panel of the D.C. Circuit (Edwards, C.J., Wald and Henderson, JJ.) affirmed in part and reversed in part the decisions below. In an opinion by Judge Henderson, the panel recognized that a prosecutor "enjoys absolute immunity . . . when he acts 'as an advocate' by engaging in activities 'intimately associated with the judicial phase of the criminal process.'" (Pet. 10a (quotation omitted)). Focusing on this Court's decision in *Buckley v. Fitzsimmons*, the panel recognized that a prosecutor's "advocatory" conduct "'include[s] the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury.'" *(Id.* at 11a-12a (quoting *Buckley*, 509 U.S. at 273)). At the same time, however, the panel observed that "when a prosecutor 'performs the investigative functions normally

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[4] At trial, Valder continued to suppress exculpatory evidence. Although Judge Revercomb ordered Valder to turn over even "borderline" *Brady* material, Valder nonetheless refused to produce either the polygraph examination (in which Spartin stated nineteen times that, to his knowledge, Moore was not aware of the kickback scheme) or Bray's amended witness statement. (Pet. 61a-62a).

performed by a detective or police officer,' he is entitled only to the qualified immunity that the detective or police officer enjoys." (*Id.* at 12a (quoting *Buckley*, 509 U.S. at 273)).

Applying *Buckley* and this Court's other decisions on prosecutorial immunity, the panel found that Valder's "unquestionably advocatory decision to prosecute Moore," as well as his decision to conceal exculpatory evidence from the grand jury, were protected by absolute immunity. (Pet. at 10a-12a). The panel refused, however, to find that Valder's attempts to coerce witnesses into giving false testimony or his unauthorized disclosure of grand jury testimony were absolutely immune from suit because, in the panel's view, Valder was not performing an advocatory function when he engaged in that conduct. (*Id.* at 13a-14a).

As the panel recognized, in attempting to coerce witnesses into incriminating Moore, Valder was exploring "whether the government ha[d] acquired all incriminating evidence" against Moore. (Pet. 13a). In the panel's view, conduct of this sort is investigatory in nature because it relates to "a typical police function, the collection of information." (*Id.* (citation omitted)). Accordingly, the panel held that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory" and therefore not protected by absolute immunity. (*Id.*). Any other result, the panel observed, would be anomalous: when, as here, a prosecutor performs investigative functions normally performed by a police officer, "'it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other.'" (*Id.* at 14a (quoting *Buckley*, 509 U.S. at 273)).

The panel also found that disclosing grand jury testimony to unauthorized third parties is not advocatory. In *Buckley*, this Court held that a prosecutor is not absolutely immune for making allegedly false statements to the press because "'statements to the media have no functional tie to the judicial process.'" (Pet. 12a (quoting *Buckley*, 509 U.S. at 277)). Finding that the unauthorized disclosure of grand jury testimony also "has no functional tie to the judicial process," the panel concluded that the

unauthorized disclosure of grand jury testimony is likewise not absolutely immune from suit. (*Id.* at 14a).

Although the panel found that Valder's attempts to coerce witnesses into giving false testimony and his unauthorized disclosure of grand jury testimony were not protected by absolute immunity, it nonetheless held that such conduct was entitled to qualified immunity. (Pet. 14a). The panel found, however, that qualified immunity would not bar Moore's claim that he was prosecuted in retaliation for his criticisms of the USPS because the right to be free from retaliatory prosecution was clearly established at the time of the conduct alleged in the complaint. (*Id.* at 16a). The panel also found any heightened pleading standard satisfied because there was evidence in the record that Moore's criticisms "produced hostility in USPS management" and that the defendants shared this hostility. (*Id.* at 17a). Accordingly, the court remanded this case to the district court. (*Id.* at 19a-20a).

The Petition for Rehearing — In response to the panel's decision, the Department of Justice filed on Valder's behalf a petition for panel rehearing with a suggestion of rehearing en banc seeking reconsideration of the absolute immunity issue. (Valder has not challenged the panel's qualified immunity ruling in either the petition for rehearing or here.) The D.C. Circuit denied rehearing without a single dissent. (Resp. App. 1a-2a). The Solicitor General subsequently declined Valder's request to petition this Court for certiorari. *See* Petitioner's Application for Further Extension of Time, Application No. A-844, May 9, 1996, at 2.

REASONS FOR DENYING THE WRIT

This case does not merit review by this Court. While this Court has long recognized that prosecutors are absolutely immune from claims based upon conduct that is "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), it has also held that prosecutors, like police officers, are protected by only qualified immunity when engaged in conduct that is investigatory in nature.

See, e.g., *Buckley*, 509 U.S. at 271-78; *Burns v. Reed*, 500 U.S. 478, 492-96 (1991), *Imbler*, 424 U.S. at 430-31.

In the decision below, a unanimous panel of the D.C. Circuit applied this distinction between advocatory and investigatory conduct. The panel concluded that the witness interrogations in this case, some conducted years before respondent's indictment and arrest, were investigatory rather than advocatory in nature because their goal was to collect (or, more precisely, fabricate) evidence of respondent's guilt. The panel also found that the unauthorized disclosure of grand jury materials has no functional tie to the judicial process and is therefore not advocatory. These rulings do not make new law: they simply apply the distinction between investigatory and advocatory conduct — and, in particular, this Court's interpretation of that distinction in *Buckley v. Fitzsimmons* — to the facts of this case. Nor do the rulings below create any conflict among the circuits. To the contrary, the decision below is consistent with the only other appellate decision to apply *Buckley* to analogous facts. As a consequence, there is no "compelling reason[]" (Sup. Ct. R. 10) for this Court to review the narrow, fact-bound decision below. The petition should therefore be denied.

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISION IN *BUCKLEY v. FITZSIMMONS* TO THE FACTS OF THIS CASE.

1. Both of the rulings Valder challenges — that coercing witnesses into giving false testimony and disclosing grand jury testimony without a court order are not absolutely immune from suit — flow directly from this Court's decision in *Buckley v. Fitzsimmons*.

The claims in *Buckley* arose out of a highly publicized murder investigation. The primary evidence of the murderer's identity was a bootprint found on the victim's door. Working hand in hand with sheriff's detectives, the prosecutor presented the bootprint to three government experts, none of whom could make a reliable connection between the print and the boots the plaintiff had voluntarily supplied. *See* 509 U.S. at 262, 272. The

prosecutor then approached an anthropologist "allegedly well known for her willingness to fabricate unreliable expert testimony," who opined that plaintiff's boots made the prints on the victim's door. *Id.* at 262. Months later, a grand jury was convened to investigate the murder, and, ten months after that, the plaintiff was indicted and arrested. *See id.* at 275.

After the jury refused to convict, the plaintiff sued, alleging that the prosecutor had violated his constitutional rights. While recognizing that a prosecutor's efforts to "control the presentation of a witness' testimony" are advocatory in nature, the Court nonetheless held that the defendant's "preindictment fabrication of evidence" was not protected by absolute immunity. *Buckley*, 509 U.S. at 272. Indeed, in the Court's view, the question was an easy one. Because the prosecutor did not have probable cause to arrest the plaintiff when he sought the anthropologist's expert testimony, the prosecutor's conduct was "entirely investigative" in character. *Id.* at 274. "A prosecutor," this Court reasoned, "neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* (footnote omitted); *but see id.* at 274 n.5 (noting that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards").

The D.C. Circuit's holding that petitioner's interrogation of Spartin and Bray was investigatory flows directly from *Buckley*. The relevant facts in the two cases are quite similar. Like the prosecutor in *Buckley*, Valder worked hand in hand with investigators to uncover new evidence, and, like the "preindictment fabrication of expert testimony" of the prosecutor in *Buckley*, Valder's attempt to coerce false testimony from Spartin and Bray occurred prior to indictment. Indeed, Valder's interrogations of Spartin took place nearly two years before Moore's indictment. Moreover, no meaningful distinction can be made between the prosecutor's attempt to fabricate expert testimony in *Buckley* and petitioner's attempt here to coerce and intimidate witnesses into changing and falsifying their testimony. Thus, as the D.C. Circuit recognized, if the prosecutor in *Buckley* was engaged in investigatory conduct when he shopped for expert

testimony incriminating the plaintiff in *Buckley*, Valder must likewise have been engaged in "a typical police function, the collection of information to be used in a prosecution," when he attempted to manipulate and coerce Spartin and Bray into incriminating respondent. (Pet. 13a (citation omitted)).

Despite Valder's attempts to characterize it as such, this case does not present a situation in which law enforcement agents investigated a matter and brought it to a prosecutor to present to the grand jury. Valder did not merely explore with the witnesses how he would present their testimony to the grand jury. Working with postal inspectors, petitioner attempted to collect new evidence by intimidating and coercing witnesses into implicating respondent. Plainly, such behavior is more than mere preparation of testimony; it falls squarely within the category of investigative conduct, just as the fabrication of expert testimony did in the *Buckley* case.

The other holding in the decision below — that Valder's unauthorized disclosure of grand jury testimony was not advocatory — also flows directly from *Buckley*. *Buckley* found that comments made by a prosecutor at a press conference are not advocatory. *See* 509 U.S. at 276-78. Conducting a press conference, this Court reasoned, is not intimately related to the judicial process: "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." *Id.* at 278. The D.C. Circuit observed that disclosing grand jury testimony to unauthorized third parties likewise does not involve the initiation of prosecution, the presentation of evidence, or actions preparatory to those functions. The court therefore concluded that under *Buckley* the disclosure of grand jury testimony is not advocatory because, like a press conference, such a disclosure "has no functional tie to the judicial process." (Pet. 14a).

Finally, even if the facts of this case could be distinguished from those in *Buckley*, the decision below would still be compelled by the principles this Court recognized in *Buckley* and

other decisions. This Court has been "quite sparing" in its recognition of absolute immunity: "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. at 486-87. Accordingly, a prosecutor seeking to invoke absolute immunity must show that "the conduct for which he seeks immunity would have been privileged at common law in 1871." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring); *accord Tower v. Glover*, 467 U.S. 914, 920-23 (1984); *Imbler*, 424 U.S. at 427. Petitioner does not even begin to satisfy this burden. Moreover, as this Court has observed, there is "no common-law tradition of immunity for [fabrication of evidence], whether performed by a police officer or prosecutor." *Buckley*, 509 U.S. at 274 n.5.

2. Valder offers a number of criticisms of the decision below. None have merit.

a. Valder attempts (Pet. 13-14 n.8) to distinguish *Buckley* by pointing out that in *Buckley* evidence was fabricated before the grand jury was empaneled. Nothing, however, in *Buckley* turns upon the largely ministerial function of empaneling a grand jury.[5] *Buckley* focused instead on whether the fabrication of evidence in that case occurred "preindictment" and "before [the prosecutor] had probable cause." 509 U.S. at 273-274. Moreover, this Court expressly rejected the suggestion that use of evidence before a grand jury can "retroactively transform [a prosecutor's misconduct] from the administrative into the prosecutorial." *Id.* at 276 (footnote omitted). Thus, *Buckley* cannot be distinguished on the ground that a grand jury happened to be empaneled in this case.

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[5] Valder's argument seems to proceed on the assumption that grand juries are specially convened by prosecutors and directed towards a single matter. In fact, grand juries are convened by judges and are normally continue for a specific period of time rather than for a specific case. *See* Fed. R. Crim. P. 6(a) & (g). Moreover, in many districts, the grand jury is always in session.

b. Valder also argues (Pet. 13) that, because "[o]btaining an indictment without probable cause has always been absolutely immunized," the misconduct alleged in this case, which "occurred in the course of obtaining an unjust and otherwise unobtainable indictment," should be absolutely immunized as well. In *Buckley*, the lower court similarly reasoned that prosecutorial misconduct prior to indictment should be absolutely immune if the only injury suffered was from the ensuing judicial proceedings. *See Buckley*, 509 U.S. at 271. This Court expressly rejected that reasoning. In this Court's view, the proper focus is not on the "[l]ocation of the injury" allegedly suffered, *id.* at 271-72, but on the conduct being challenged and, in particular, on whether there was a common-law tradition of absolute immunity for that conduct. *See id.* at 274 n.5. As indicated above, *see supra* pp. 12-13, there is no evidence of such a tradition for the conduct at issue in this case.

c. Valder repeatedly asserts (Pet. 3-4, 14-16, 23) that the decision below focused upon the improper means he employed rather than the functions he performed. This is simply not true. The decision below focused upon the fact that Valder's conduct "relate[d] to a typical police *function*, the collection of information to be used in a prosecution," and "ha[d] no *functional* tie to the judicial process." (*Id.* at 13a-14a (emphasis added)). Nothing in the decision below even remotely suggests that a plaintiff can defeat the bar of absolute immunity by merely alleging the use of improper means. It should come as no surprise then that Valder derives (*id.* at 14) his assertion not from an analysis of the decision below, but from an analysis of the complaint — which, as Valder acknowledges (*id.* at 16), had to allege that Valder employed improper means in order to state a claim.

II. PETITIONER HAS NOT SHOWN ANY CONFLICT AMONG THE LOWER COURTS OVER THE PROPER APPLICATION OF THIS COURT'S DECISION IN *BUCKLEY*.

Petitioner asserts (Pet. 3, 17) that the decision below is "contrary to" and "at odds" with the decisions of other circuits. Most of the decisions he cites were, however, decided before *Buckley* and thus have no continuing relevance.[6] Only three cases

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[6] In fact, many of the pre-*Buckley* decisions Valder cites conflict with *Buckley*. For example, while *Buckley* held that a prosecutor's investigatory functions are not entitled to absolute immunity, *see* 509 U.S. at 272, one of the decisions cited by Valder states that absolute immunity extends "to a prosecutor's actions in initiating, *investigating* and pursuing a criminal prosecution." *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980) (emphasis added). Other decisions, contrary to *Buckley*'s holding that a prosecutor cannot act as an advocate "before he has probable cause to have anyone arrested" (509 U.S. at 274), hold that any attempt by a prosecutor to "evaluate whether probable cause existed to charge" is advocatory. *Myers v. Morris*, 810 F.2d 1437, 1451 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987); *see also Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir. 1984) (holding that "conferring with potential witnesses for the purpose of determining whether to initiate proceedings" is advocatory), *cert. denied*, 469 U.S. 1127 (1985). Yet another decision cited by Valder holds that "direct solicitations of testimony for use in the grand jury proceedings" is advocatory. *Rose v. Bartle*, 871 F.2d 331, 344 (3d Cir. 1989). In *Buckley*, however, the Court held that the fact that "the prosecutors later called a grand jury to consider the evidence this [investigative] work produced does not retroactively transform that work from the administrative into the prosecutorial." 509 U.S. at 275-76.

In addition, none of the cases cited by Valder consider whether the unauthorized disclosure of grand jury testimony is advocatory in nature. True, Valder does characterize (Pet. 22) the Third Circuit's decision in *Rose* as "holding" such disclosures absolutely immune from suit. In fact, however, the Third Circuit refused to consider the issue because, in its view, there was insufficient evidence before it to "determine what 'role' the defendants were acting in" when they disclosed grand jury

were decided after *Buckley*. Two of those cases bear little factual resemblance to this case. *See Pinaud v. County of Suffolk*, 52 F.3d 1139, 1150-51 (2d Cir. 1996) (considering claim based upon guilty plea); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1267 (8th Cir. 1996) (considering claim based upon interviews during the pendency of a judicial proceeding). And the third is easily distinguishable.

In the third case, *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 947 (1996), the plaintiff alleged that the prosecutor "*probably* directed" a Texas ranger to coerce witnesses into identifying plaintiff as the murderer. 64 F.3d at 201 (emphasis added); *see also Ex Parte Brandley*, 781 S.W.2d 886, 888-90 (Tex. Crim. App. 1989) (describing the ranger's alleged conduct). The Fifth Circuit evidently found this allegation too equivocal to state a claim against the prosecutor, for while the court noted that the prosector was immune from other claims, it did not address the coercion claim. *See Brandley*, 64 F.3d at 201 (observing that a prosecutor enjoys absolute immunity even where he "knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make disclosure of all facts casting doubt upon the state's testimony") (citation omitted). Thus, far from conflicting with the D.C. Circuit's decision that preindictment witness interrogations designed to elicit new and false testimony are investigatory rather than advocatory in nature, *Brandley* did not even consider the issue.

The only post-*Buckley* case to consider this issue is the Second Circuit's decision in *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995), which Valder curiously failed to cite in the petition. In *Hill*, the plaintiff alleged that a prosecutor had coerced a young witness into giving false testimony. Although the testimony was videotaped for the express purpose of presenting it to the grand jury and was, in fact, presented to the grand jury six days after it was recorded, the Second Circuit refused to find the prosecutor absolutely immune. *See* 45 F.3d at 662-63. Citing *Buckley*, the

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testimony. 871 F.2d at 346.

Second Circuit reasoned that "if the videotapes were made to collect or corroborate evidence against Hill in order to get probable cause to arrest her, the act of making the tapes receives only qualified immunity." *Id.* at 662. As the interview in that case could, consistent with the pleadings in the case, have been conducted prior to the prosecutor obtaining probable cause, the Second Circuit refused to find the prosecutor's conduct absolutely immune from suit. *See id.* at 663. Thus, far from conflicting with the decisions of other courts, the decision below is consistent with the only analogous appellate decision applying *Buckley*.

III. THE DECISION BELOW DOES NOT PRESENT ANY ISSUE WARRANTING THIS COURT'S REVIEW

Valder contends (Pet. 3, 23) that the decision below "establishes exceptions to the rule of absolute immunity that swallow the rationale for the rule itself" and that it threatens to "overturn twenty years of this Court's precedents and an entire body of common law immunity decisions." This is empty rhetoric. As shown above, *see supra* pp. 10-13, 14, far from announcing any broad, new principle, the opinion below simply applies this Court's decision in *Buckley* to the specific facts of this case.

It is significant that the Department of Justice did not mention the dire consequences Valder predicts in the petition for rehearing it filed on Valder's behalf before the D.C. Circuit. For example, although the Department of Justice employs more than 4,000 prosecutors, *see* United States Department of Justice, *Legal Activities 1995-96* 3 (1995), the United States never suggested that the decision below would overturn the entire body of common law immunity decisions. Moreover, the Department of Justice declined to seek certiorari, which is hardly the response one would expect if the decision below really threatened to undermine prosecutorial immunity.

Finally, contrary to Valder's suggestion, the decision below does not leave prosecutors at the mercy of frivolous and vexatious complaints. Qualified immunity — which protects government officials against liability so long as they do not violate any

clearly-established rights (*see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) — "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[7] True, the qualified immunity standard does not leave prosecutors wholly free of concern when they interrogate witnesses and may lead them to hesitate to use certain techniques. This, however, is "precisely the point of the [qualified immunity] standard: Where an official could be expected to know his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quotation omitted) (emphasis in original).

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[7] Qualified immunity provides more than sufficient protection against the difficulties petitioner asserts (Pet. 18) courts will have in "drawing a clear line between proper assertiveness and 'coercion'" when a prosecutor is interviewing a witness. If the line is unclear, the right will not be clearly established and the official will be immune from suit. *See Harlow*, 457 U.S. at 818.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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July 15, 1996

APPENDIX

[Filed Jan. 23, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5341 September Term, 1995
92cv02288

William G. Moore, Jr.,
Appellant
v.
Joseph B. Valder, et al.

And consolidated case No. 93-5343

BEFORE: Edwards, Chief Judge; Wald and Henderson, Circuit Judges

ORDER

Upon consideration of appellees' Suggestion for Rehearing In Banc, the response thereto, and the absence of request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

[Filed Jan. 23, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5341 September Term, 1995
92cv02288

William G. Moore, Jr.,
Appellant
v.
Joseph B. Valder, et al.

And consolidated case No. 93-5343

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellees' Suggestion for Rehearing In Banc, the response thereto, and the absence of request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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November 30, 1989

VIA HAND DELIVERY
Michael E. Shaheen, Jr., Esq.
Counsel, Office of Professional Responsibility
United States Department of Justice
10th & Constitution Avenue, N.W.
Room 4304
Washington, D.C. 20530

Re: *United States of America v. Recognition Equipment Incorporated, et al.*, Cr. No. 88-0385

Dear Mr. Shaheen:

Defense counsel in the above-entitled case are forwarding to you relevant materials regarding our Motion to Dismiss Due To Prosecutorial Misconduct. We enclose the following:

1. Defendants' Joint Motion and Memorandum to Dismiss the Indictment With Prejudice Due To Prosecutorial Misconduct.

2. Exhibits To Defendants' Joint Motion to Dismiss.

3. Transcript of Proceedings, *United States of America v. Recognition Equipment, Incorporated, et al.*, Thursday, November 2, 1989, pages 3304-3315.

4. Government's Opposition to Defendants' Joint Motion to Dismiss the Indictment.

5. Defendants' Reply to Government's Opposition.

6. The Court's Memorandum Opinion and Order granting Defendants' Joint Motion for Judgment of Acquittal.

Because the Court granted our Motions for Judgment of Acquittal following the government's case, the Motion to Dismiss was denied as moot. However, we believe that the conduct documented in the pleadings and transcript should be investigated by your office.

In addition to the matters contained in the pleadings, we respectfully submit that there is at least one other significant issue which should be examined. Following Assistant United States Attorney Valder's decision to seek an indictment, counsel to the defendants provided a joint submission, 300 pages in length, describing what we believed to be the evidence in this case and establishing that this case did not support an indictment. This submission was reviewed by the United States Attorney for the District of Columbia and by the staff of the Assistant Attorney General in charge of the Criminal Division. Our appeals were rejected. We question whether candid and complete information was provided to the reviewers. Particularly, we must question whether the reviewing authorities were fully aware of the exculpatory evidence which was available to the prosecutor and the Postal Inspectors, including that the coconspirator repeatedly told Mr. Valder and the Postal Inspectors that the defendants were not told of the illicit payoffs to Mr. Voss and that a key immunized witness (Spartin) told a polygraph examiner in a 53 page statement (*see* Exhibit B to our Motion to Dismiss) on approximately 19 different occasions that he did not tell the defendants about the payoff scheme and to his knowledge the defendants did not know. We also must question whether the reviewing authorities were aware of the fact that Spartin was allowed to review the Grand Jury statements of four other coconspirator in violation of Rule 6(e).

If Mr. Valder obtained the approval to go forward with the indictment without this information being provided to the reviewing authorities, then we submit the reviews were meaningless and the decision of the Department of Justice in this

important case was made on a misleading record. Had all the information been provided to the reviewing authorities as part of the proper review of this matter, we believe that prosecution would have been declined. The carefully considered opinion of the Court granting our Rule 29 Motion for Judgment of Acquittal supports this conclusion and is based upon a record identical in all significant respects to that described in the defendants' joint submission referenced above.

The decision to indict was a bad one, and it was devastating to the defendants.

We would appreciate your acknowledging receipt of these materials.

Sincerely,

/s/Robert S. Bennett
Robert S. Bennett
Dunnells, Duvall, Bennett
& Porter
Counsel for Robert W. Reedy

/s/Marshall Searcy
Marshall Searcy
Locke Purnell Rain Harrell
Counsel for Recognition
Equipment Incorporated

/s/John P. Cooney, J.
John P. Cooney, Jr.
Davis Polk & Wardwell
Counsel for Recognition
Equipment Incorporated

/s/Charles A. Stillman
Charles A. Stillman
Stillman, Friedman &
Shaw, P.C.
Counsel for William G. Moore

Office of Professional Responsibility
Washington, D.C. 20530

May 30, 1991

Robert S. Bennett, Esquire
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107

Dear Mr. Bennett:

We have completed our inquiry into allegations of misconduct you made against Assistant U.S. Attorney Joseph B. Valder arising from the prosecution of *United States v. Recognition Equipment Incorporated, et al.* As more fully set forth below, we have concluded that the allegation that the grand jury was misled regarding the state of knowledge of the defendants can not be sustained. Moreover, we have concluded that the supervisory review of the indictment was not tainted by misrepresentations regarding the state of knowledge of the defendants. As a result, we found that there was a sufficient basis for bringing the indictment. We also found several instances of actions by AUSA Valder which we believe merit further attention by the Department. Accordingly, we have forwarded those matters to the Executive Office for U.S. Attorneys for further consideration. We now consider the matter to be closed.

We have carefully examined the issue of whether or not the grand jury which returned the indictment in this case was misled regarding the state of knowledge of the defendants. Our examination of the record has convinced us that the grand jury was never under the impression that the defendants had actual knowledge of the criminal activity of the Voss-Gnau conspiracy. Moreover, we are also satisfied that the grand jury was not led to believe that the defendants' knowledge was based upon anything other than circumstantial evidence. We are constrained from providing any additional details of the grand jury's state of

knowledge because of the limited release of grand jury materials in this case.

We have also considered the question of whether the supervisory review of the proposed indictment within the U.S. Attorney's Office and the Department of Justice was flawed because of misrepresentations as to the state of knowledge of the defendants. We similarly found that the reviewers were well aware of both the circumstantial nature of the case and the difficulties of proof which the case presented. This proposed indictment received extraordinary review within the U.S. Attorney's Office; the decision to indict was not reached without long and comprehensive debate. Ultimately, however, the United States Attorney made a decision to proceed with an indictment.

The supervisory process that resulted in that decision was exhaustive. There were numerous meetings at which the merits of the case were debated and analyzed. Memoranda which scrutinized each count of the proposed indictment were prepared and circulated. In the course of that procedure, the indictment was modified and refined several times before final approval. As a result, the problem areas of the case, including the state of knowledge of the defendants, were identified and fully considered. In addition, extensive presentations on behalf of the defendants were made to both the U.S. Attorney and the Department prior to the approval of the indictment, and those presentations produced even more supervisory review, further analysis of the case, and additional fine-tuning of the indictment. In the light of the extensive and extraordinary review afforded this matter, we cannot conclude that the review process for this indictment was deficient.

It would be easy, given the benefit of hindsight, to conclude that in light of the judgment of acquittal the decision to indict was clearly incorrect. Accordingly, our standard of review has been to determine whether there was a rational basis for the U.S. Attorney's decision. Our examination of the record has led us to the conclusion that sufficient evidence supported the government's theory of the case. Our analysis of that evidence, including, *e.g.*,

the apparently missing pages from Mr. Moore's spiral notebooks and Mr. Reedy's apparently false statements to the Postal Inspectors, as well as his seemingly conscious disregard for the signals — "it's better that you don't know about the relationship between Gnau and Voss" — he was receiving, led us to the conclusion that there was a rational basis for the U.S. Attorney to conclude that there was a probability of a conviction if the case were indicted.

We turn next to specific complaints concerning the procedures used by the government in its presentation of the evidence to the grand jury. We first examined the use of witness summary statements before the grand jury as a means of streamlining the presentation of testimony. While we are satisfied that the use of summaries is legally permissible, we are concerned that their use creates the appearance that the government is seeking to tailor testimony. However, the fact that the witnesses were made available to the grand jury and that questions were asked of the witnesses beyond the limits of the statements, together with our review of the grand jury materials, led us to the conclusion that the government did not seek to tailor the testimony. We remain concerned about the appearance problem, and we intend to discuss it with the Executive Office of U.S. Attorneys.

Next, we considered the allegation that the government elicited an opinion from one grand jury witness, Mr. William Spartin, regarding his belief as to the state of knowledge of the defendants while refusing to permit another grand jury witness, Mr. Frank Bray, to state a contrary opinion. While we are satisfied that there was ample evidence beyond the opinion testimony to support the indictment, the disparate treatment of the two witnesses compounds the appearance problem created by the use of the summary statements. Moreover, we are concerned that Mr. Bray was restricted in his desire to include additional testimony in his statement. While a prosecutor may properly object to a witness's seeking to include extraneous or irrelevant information in a statement, in this instance it cannot be said that the opinion statement was irrelevant since the prosecutor had elicited an opinion on the same subject from Mr. Spartin. Accordingly, we

must conclude that the prosecutor exercised poor judgment when he refused to allow the witness to amend his statement to include his opinion. At the same time, however, we are satisfied that the prosecutor excluded the opinion solely because he believed that witness did not possess sufficient information to offer a competent opinion.

We also examined the circumstances surrounding the cooperation of Mr. Spartin with the government. Mr. Spartin was a key player in the Voss-Gnau conspiracy which gave rise to the instant prosecution. When the government obtained Mr. Spartin's cooperation and began to debrief him, he failed to recall numerous events — such as being in a particular city on a particular date — at which others had irrefutably placed him. This failure was so pervasive that, after consulting with his supervisors, the prosecutor dramatically confronted Mr. Spartin with his faulty memory by tearing up his non-prosecution letter. That action was not taken as a consequence of Mr. Spartin's inability to implicate directly the REI defendants, but solely because he could not recall attending a number of meetings where others had unequivocally placed him. That being the case, we cannot conclude that the prosecutor's actions were unwarranted nor can we conclude they were motivated by the prosecutor's displeasure with Mr. Spartin's inability to implicate directly the REI defendants.

Similarly, we examined the claim that the prosecutor threatened to prosecute Mr. Spartin's son if he did not implicate the REI defendants. We found no support for that contention. Rather, as a consequence of Mr. Spartin's failure to recall certain meetings, the prosecutor told him only that his son would be served with a grand jury subpoena to testify about the various meetings which he was aware that his father had attended.

We also examined the use of the witness statements of other witnesses to refresh Mr. Spartin's recollection. Mr. Spratin was given the statements of other witnesses who placed him at various meetings which he could not recall. In one instance, he was given a copy of a statement which indicated that it was a grand

jury exhibit. We have reviewed the conflicting legal authority on what constitutes grand jury material, and while there is ample precedent supporting the proposition that statements created outside of the grand jury may be used without Rule 6(e) restrictions, it is clear that use of the document which specifically indicated its use in the grand jury must, at least technically, be treated as subject to Rule 6(e) restrictions. Accordingly, we reviewed the Department's policy regarding the use of the statement to refresh Mr. Spartin's recollection. Our review revealed that the Department considers permissible the use by a prosecutor of grand jury material to refresh a witness's recollection. Based upon that policy, we cannot conclude that the prosecutor's actions constitute a 6(e) violation. Moreover, under the Department's construction of Rule 6(e), a copy of the statement which did not clearly indicate its grand jury connection could have been used without even technically implicating Rule 6(e).

We examined the circumstances regarding the apparent loss of a draft of Mr. Bray's witness statement. There was a great deal of negotiation over the text of Mr. Bray's statement, and it went through several evolutions. The controversy arose over the refusal of the prosecutor to allow Mr. Bray to include in his statement various information including his opinion on the lack of knowledge by the REI defendants. As a result the defense was very interested in the drafts of Mr. Bray's statements. In the course of the trial, the prosecutor offered various explanations for the failure of the government to find the statement, some of which were inconsistent. Our inquiry shed little additional light on the whereabouts of the statement at issue. We do not believe, however, that it was either intentionally or negligently destroyed. Indeed, there is some evidence that the draft statement which was produced was actually the statement in question, but that could not be definitively established. Nevertheless, we are concerned with the prosecutor's handling of this aspect of the case. We do not believe that the prosecutor exercised sound judgment when he asked leading questions of the witness which he should have

known rested upon a faulty premise and which thereby led to questions regarding his candor and credibility on the matter.

We next examined allegations that the prosecutor failed to comply with his obligations under *Brady v. Maryland* and misled the court concerning his compliance. We found the prosecutor's compliance with the court's April 6, 1989 discovery order to have been deficient. The court specifically ordered that the government provide to the defense "any statements to the effect that the defendants were not involved in, or did not know of, the Voss-Gnau conspiracy[,]" 711 F. Supp. 1, 14 (D.D.C. 1989). Moreover, at a pretrial hearing on July 11, 1989, the court indicated that the prosecutor was to provide even "borderline" *Brady* material (pretrial conference transcript at 60). That was not done. We are particularly concerned with the failure to provide to the defense, at least following the pretrial conference, the text of the polygraph examination of Mr. Spartin wherein he made some nineteen references to the defendants' lack of knowledge of the Voss-Gnau conspiracy. Similarly, we are concerned that the prosecutor's response to the court with respect to *Brady* compliance contained in his June 13, 1989 letter was inaccurate.[1] Both the omission of the Spartin polygraph and the inaccurate letter to the court merit further review by the Executive Office for U.S. Attorneys.

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[1] In the June 13, 1989 letter which was written to defense counsel with a copy to the court, AUSA Valder stated that the government was "in compliance with the court's discovery orders in this case." In fact, as noted, the court had ordered the government to produce to the defense "any statements" indicating the defendants lack of knowledge of the Voss-Gnau conspiracy. The transcript of the polygraph examination of William Spartin contains some nineteen instances of Spartin telling the examiner that the defendants did not know of the Voss-Gnau conspiracy. The document had not been produced at the time of the June 13, 1989 letter. AUSA Valder has not contended that the transcript of Spartin's polygraph examination was unknown to him at the time he wrote the letter.

We also considered the question of the contracts by the Postal Inspectors with former Postmaster General Carlin. It was alleged that the Inspectors, in one instance, gave Mr. Carlin a copy of the draft indictment in the *REI* case and, in a second instance, allowed Mr. Carlin to review witness statements taken by the Postal Inspectors which the defense contended were grand jury material. We are unable to conclude that Mr. Carlin was given a copy of a draft indictment. Rather, we found that AUSA Valder instructed the Inspectors to verify two dates with Mr. Carlin. We found that the request to verify the dates was entirely proper, and we found that AUSA Valder did not instruct the Inspector to permit Mr. Carlin to review any proposed counts in an indictment. Even assuming that the Inspector allowed Mr. Carlin to read the text of the proposed count, we cannot conclude that such action by the Inspector was directed by AUSA Valder.[2] Second, we found that AUSA Valder had no role in the briefing of Mr. Carlin on the results of a separate inquiry conducted by the Postal Inspectors. Accordingly, we found no misconduct by AUSA Valder since he had nothing to do with the briefing of Mr. Carlin by Inspector McIntosh.

Finally, we examined the totality of the prosecutor's conduct in this matter. Our inquiry did not establish that the prosecutor's actions were part of a cover-up of misconduct. We found no support for the argument that the prosecutor had misled the grand jury. Similarly, we concluded that the prosecutor did not impermissibly tailor the witnesses' testimony. Moreover, we found that the supervisory indictment review process considered the problem areas of the case, but concluded that they could be overcome. Accordingly, we concluded that the broad based claim of misconduct with supporting cover-up must fail. Based upon

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[2] There is authority for the proposition that a draft indictment is not grand jury material covered by Rule 6(e) of the Federal Rules of Criminal Procedure. We are not deciding here whether or not a draft indictment is covered, rather we have concluded that AUSA Valder did not engage in misconduct in this matter simply by having the Inspector verify a date he planned to include in his indictment.

our inquiry, we have also concluded that there was simply no intent on the part of the prosecutor to do anything other than to present this case to the best of his ability. Indeed, the deficiencies we have identified in this case simply do not rise to the level of serious misconduct, and fall exceedingly short of the misconduct identified by the *Omni* case to which this case has been compared. Here, when the court previously reviewed allegations of misconduct by the prosecutor it concluded that the prosecutor had not engaged in misconduct, 711 F. Supp. 1, 11-13 (D.D.C. 1989). Indeed, the court concluded that "[e]ven accepting the defendants' allegations as true, the alleged prosecutorial misconduct was not significant enough * * * either to justify on its own a motion to dismiss the indictment or [even] to justify granting discovery of the entire grand jury transcript[,]" *id.* at 13. That is consistent with the findings of our inquiry, and it is entirely inapposite to Judge Black's findings in *Omni*.

Thank you again for bringing this matter to our attention.

Sincerely,

MICHAEL E. SHAHEEN JR.
COUNSEL

By: /s/J. Thomas Ezell
J. Thomas Ezell
Assistant Counsel

Office of Professional Responsibility
Washington, D.C. 20530

August 1, 1991

Jay B. Stephens, Esquire
United States Attorney
District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20001

Dear Mr. Stephens:

This is in response to Principal Assistant U.S. Attorney William Birney's letter of June 13, 1991, in which he sought, on behalf of AUSA Joseph Valder, reconsideration of our decision finding AUSA Valder's compliance with the court's discovery order in *United States v. Recognition Equipment, Inc.*, et al. to have been "deficient." That finding was based upon our understanding of AUSA Valder's handling of the transcript of the polygraph examination of William Spartin, in which he made a number of statements which were exculpatory to the defendants.

Although there was extensive discussion with AUSA Valder regarding numerous issues in this complicated case, including the polygraph examination of Mr. Spartin, neither we nor AUSA Valder focused upon the fact that, in compliance with the court's discovery order, he had provided defense counsel with extensive quotes from the transcript of the polygraph examination. Indeed, AUSA Valder's letter to all defense counsel of June 7, 1989, contains the exculpatory statements as reported in the transcript of the polygraph examination. While the letter does not include additional statements by Mr. Spartin that he was not present when any of the defendants were told of the Voss-Gnau conspiracy (we believe the better course would have been to provide those statements at that time), AUSA Valder has demonstrated that his disclosure of June 7, 1989, met the letter of the court's discovery order. Accordingly, we must conclude that AUSA Valder's compliance with the discovery order was not deficient.

With respect to AUSA Valder's request that we "reconsider referring the matter to the Executive Office" regarding the other findings in our original decision, we decline to take such action. Our referral to the Executive Office is routine in matters in which Assistant U.S. Attorneys are involved, and we see no basis to deviate from that procedure here. Accordingly, by a copy of this letter, we will advise the Executive Office of our decision that AUSA Valder was not deficient in his compliance with the court's discovery order.[1] Any further action with respect to the other matters identified in our May 30, 1991 letter to Mr. Bennett is entirely within the discretion of the Executive Office.

Thank you for your continuing cooperation. If you have any questions, please contact me or Assistant Counsel Tom Ezell on 514-3365.

Sincerely,

/s/Michael E. Shaheen Jr.
Michael E. Shaheen Jr.
Counsel

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[1] Copies of this letter will also be sent to Mr. Bennett and the other defense counsel to advise them of our conclusion that AUSA Valder was not deficient in his compliance with the court's discovery order.

STATE OF TEXAS	)	
	)	
	)	Civil Action
	)	No. 3-91CV2491-G
DALLAS COUNTY	)	

AFFIDAVIT OF WILLIAM G. MOORE, JR.

William G. Moore, Jr., being first duly sworn according to law states:

1. My name is William G. Moore, Jr., I reside at 4720 Northaven Road, Dallas, TX 75229. My date of birth is April 12, 1939. I am under no legal disability which would render me incompetent to make this affidavit.

* * * *

34. In 1983 I was asked to be chairman of the Dallas Mayor's High Technology Task Force. In 1984 I was honored as Dallas/Ft. Worth Businessman of the Year (see attached Dallas Ft. Worth Business Journal article). In 1985, I was elected Chairman of the American Electronics Association (AEA) In 1987 President Reagan appointed me to the Advisory Committee For Trade Negotiations (ACTN) made up of the CEO's of some of America's most prestigious companies including IBM, 3-M, Boeing, etc. ACTN was chaired by James Robinson of American Express and interfaced directly with the United States Trade Representative (USTR), Clayton Yeutter. I was invited and agreed to join numerous public interest boards, including the Boys Clubs of America, Boy Scouts of America, and the Public Broadcasting System (KERA — Channel 13) in Dallas.

/s/William G. Moore, Jr.
William G. Moore, Jr.

Sworn To And Subscribed
before me this 28th day of June, 1990.
/s/Cynthia A. Langford
Notary Public
[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM G. MOORE, JR. and BLANCHE K. MOORE,	)	
Plaintiffs,	)	
v.	)	
JOSEPH B. VALDER, MICHAEL HARTMAN, FRANK KORMANN, ROBERT EDWARDS, PIERCE MCINTOSH, DANIEL HARRINGTON, (first name unknown) ROBBINS, and OTHERS as of yet unknown, hereby designated as Joe Doe defendants 1-25,	)	Civil Action No. 3-91CV2491-G
Defendants.	)	
STATE OF FLORIDA	)	
	)	SS:
COUNTY OF INDIAN RIVER	)	

AFFIDAVIT OF WILLIAM C. HITTINGER

Before me, the undersigned authority, personally appeared William C. Hittinger, who being first duly sworn according to law, deposes and states as follows:

1. My name is William Hittinger. I reside at 149 Bellevue Avenue, Summit, NJ 07901.

2. I serve on the Board of Directors of Recognition Equipment, Inc. ("REI") and have done so for more than ten years. I hold a Bachelors Degree from Lehigh University, from

which I have also received an honorary doctorate. I am presently the Chairman of the Board of Trustees at Lehigh and have served on that Board since 1972. I am also a member of the Board of Directors of Bethlehem Steel Corporation, UNC Corporation, Thomas and Betts Corporation and The Stabler Companies. I have served on numerous other civic and charitable organizations and committees, including the National Security Telecommunications Advisory Council, a commission which reported to the President of the United States, and I was appointed to serve on the Presidential Commission on United States-Brazil Technology.

3. Following my graduation from Lehigh University and service in the U.S. Army during World War II, I was employed by Western Electric and National Union Radio Corporation before joining Bell Laboratories in 1954. I was eventually promoted to the position of Executive Director of Semiconductor and Electric Tube Division, and from 1966 to 1968 I was President of Bellcomm, Inc., a subsidiary of AT&T. In that capacity, I worked on the Apollo Space Program. From 1968 to 1970, I was President of General Instrument Corporation. From 1970 to 1986, I was employed by RCA, from which I retired as an Executive Vice President in 1986.

4. I first met William G. ("Bill") Moore, Jr., in about 1981 when, in my capacity as a Director of REI, I interviewed him as part of REI's search for a new president. He was subsequently hired by REI as Chief Executive Officer and President and eventually was elected Chairman of the Board of Directors as well.

5. In late 1987 to 1988, I was asked to testify before a grand jury in Washington, D.C. in connection with what I understood to be an investigation of REI and the activities of Bill Moore and others. I was not accompanied by counsel when I appeared to testify.

6. The day of my testimony, as I recall, I had lunch with Assistant U.S. Attorney Joseph Valder and two men whom I understood to be postal inspectors assisting Mr. Valder in the

investigation. That conversation was memorable to me because at one point, Mr. Valder stated in substance that the merits of the case or whether the persons involved were guilty or not did not concern him. He explained that it was important to him that he win the case because he wanted to get a track record or some notoriety which would help him obtain a good position in private practice. He explained that his career objectives went beyond the Department of Justice and that the REI case meant a lot to him and his career. The substance of his conversation was that he wanted to get a conviction in that matter because he thought it would help him land a lucrative position in corporate law.

I was shocked and infuriated that he seemed not to be interested in fairly assessing the merits of the case but saw the investigative proceeding as his opportunity to get a significant "win" for his career advancement. This was inconsistent with my understanding of how a federal prosecutor was supposed to act, and it upset me greatly. I later reported the conversation to company counsel.

7. When I testified before the grand jury, I felt that I was berated by Mr. Valder with respect to how the Board of Directors of REI and I, as Chairman of its Compensation Committee, construed a financial compensation package for Bill Moore. Mr. Valder seemed to want to make it appear to the grand jury that there was something improper about the compensation being paid to Mr. Moore. This seemed to me to be not fairly related to what I understood were the matters under investigation, and I recall that his approach troubled me as being unfair. I did my best to explain how carefully we had worked to evaluate comparable compensation packages for executives in other companies and how executive compensation generally is established.

I have read the foregoing affidavit, and I swear that the facts contained therein are true and correct to the best of my personal knowledge, information and belief.

/s/William C. Hittinger
William C. Hittinger

SWORN TO AND SUBSCRIBED
before me this 28th day
of March, 1992.

/s/Aubrey J. Lanier
Notary Public

[SEAL]

TRANSCRIPT
OF PROCEEDINGS
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	Criminal Action Number CR 88-0385
RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., ROBERT W. REEDY, Defendants.	:	

Washington, D.C.
Wednesday, October 18, 1989

* * * *

[Redirect Examination: Frank Bray]

[1824]* * * *

Q And do you recall my offering you and your attorney the opportunity to not do a summary at all but for you to come before the Grand Jury, and if it was necessary, we would take five entire days or seven entire days, however long it took, for you to respond in question and answer form with me to cover the range of what you knew?

[1825]

A Yes, sir.

[1]

ROBBINS: Testing for polygraph examination at Washington, DC on December 5, 1986, testing, testing, for polygraph examination, December 5 at Washington, DC, December 5, 1986. I'm gonna tape record everything we do here today and you have had several polygraph tests, I understand, over the past five or six months.

SPARTIN: That is correct, I've had three.

ROBBINS: Three tests. When was the last test you had?

SPARTIN: Last week

ROBBINS: Did you take that over in Virginia?

SPARTIN: Yes sir, I did.

ROBBINS: How long did it take to do that?

SPARTIN: Oh I guess from the time we started until I left about an hour.

ROBBINS: Your first name is William?

SPARTIN: William, yes sir.

ROBBINS: You have a middle name?

SPARTIN: Yes I do, Anthony.

ROBBINS: S-P-A-R-T-I-N? Where were you born?

SPARTIN: Chicago.

ROBBINS: When?

SPARTIN: October 5, 1929, makes me 57.

ROBBINS: Where do you live?

SPARTIN: I live at 10801 Stanmore, S-t-a-n-m-o-r-e Drive, Potomac, MD

ROBBINS: How long you lived there?

SPARTIN: Since '75, 10-11 years.

ROBBINS: Who lives there with you?

SPARTIN: My wife and various children from time to time. We have four children. They have been in and out.

ROBBINS: And what's your wife's name?

SPARTIN: Cleo, C-l-e-o. * * * *

[16]* * * *

[SPARTAN]: To my knowledge, REI didn't know about the deal, meaning the conspiracy and bribery. I never told them and there's a feeling around that REI knew about the whole thing and I didn't tell them, so I don't know if REI did or not. * * * *

[19]* * * *

ROBBINS: What would you talk about? Was REI aware that there was finagling going on with the contract? That there was unfair advantage being taken on the part of Voss and Gnau?

SPARTIN: I think, sir, that REI had to be pleased as punch when they saw the bid go out because it was written very narrowly. Now, did I tell REI about that? No.

ROBBINS: Alright, who did?

SPARTIN: I don't know. I can speculate but I can't give you, I've tried to avoid putting other people into the soup on this thing if I don't know to the fact. If I say to you I can speculate, I can speculate. If you want me to speculate, I will. * * * *

[20]* * * *

ROBBINS: Did you or anyone at REI know that Peter Voss was getting paid as part of that thing?

SPARTIN: To my knowledge, no sir.

ROBBINS: You never discussed it with them?

SPARTIN: I did not discuss it with them.

ROBBINS: Were you ever present when anyone talked to them about Voss about getting any money?

SPARTIN: No sir.

ROBBINS: Was Peter Voss ever at any meetings with REI?

SPARTIN: He was never at any of our meetings with REI. . . . * * * *

SPARTIN: To my knowledge, REI did not know anything about bribing Pete Voss nor did he knew anything about the agreement in terms that Peter Voss was part of it.

ROBBINS: You didn't tell them.

SPARTIN: I did not tell them, no sir.

ROBBINS: You were never present when REI people discussed such a thing?

SPARTIN: No sir, I was not.

ROBBINS: You never overheard anyone tell anyone from REI. . . .

SPARTIN: No sir.

ROBBINS: . . . . that Voss getting paid from John Gnau?

SPARTIN: No sir. * * * *

[28]* * * *

ROBBINS: Do you have any knowledge about whether anyone in REI knew Pete Voss was involved in this scheme to get them the sole source contract? Or was being paid?

SPARTIN: Let me answer you this way. Being paid, no sir, I don't. I have no knowledge of that at all. Peter Voss being part of the deal, no knowledge. But, you know I read that goddamn testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm. REI, Voss told REI to use Gnau and I didn't read this anywhere. John Gnau told me that and I told that to the Inspectors. * * * *

[36]* * * *

ROBBINS: . . . Okay one of the questions I want to ask you, Bill, is were you present when anyone in REI was told that Gnau was paying Voss to help REI get the Post Office contract and what was your answer to that question?

SPARTIN: Was I present? No.

ROBBINS: Do you have any knowledge that anyone in was told that?

SPARTIN: I only have my suspicions. I think between you and I and this wall that John Gnau was very close to Bob Reedy and John has a tendency to talk. John's a talker, can't keep a secret if his life depended on it. My gut tells me that John and Reedy are a lot closer than people think. So to answer to that question, read it again to me.

ROBBINS: Okay, my question is, were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No.

ROBBINS: But your feeling is that John Gnau probably did.

SPARTIN: Yeah, I have a suspicion that there's more than meets the eye, that's what I'm trying to tell you.

ROBBINS: John Gnau, did he ever tell you that he told anybody at REI?

SPARTIN: John never shared, if you can believe this, here we were sort of friends, business friends, he never told me anything he was basically doing. John never told me about it. * * * *

[40]* * * *

ROBBINS: I want you to tell me how you're gonna answer it. Have you lied to me today about the facts in this case?

SPARTIN: No.

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI to get a post office contract?

SPARTIN: No.

ROBBINS: Since your April 7 agreement with the government, have you planned with anyone to conceal any facts about this case?

SPARTIN: No. * * * *

[43]* * * *

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No. * * * *

[45]* * * *

ROBBINS: Were you present when anyone at REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No. * * * *

[48]* * * *

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No. * * * *

[49]* * * *

SPARTIN: It's so bad I want to help, I just don't know how, that's the problem.

ROBBINS: Well, you can't help anything on this test. Just sit quietly and answer the questions.

SPARTIN: I don't mean just this test, I mean this whole mess. If I just could be more helpful.

ROBBINS: If you knew something on REI you'd tell us.

SPARTIN: Boy, would I tell you, I got nothing to lose. It's stupid not to tell. Even John McKean, that man, has probably cut more side deals than anybody, but I can't make up a story.

* * * *

[50]* * * *

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No.* * * *

[51]* * * *

SPARTIN: I thought they played a dirty game with me because they tried to get my son involved.

ROBBINS: Who was that?

SPARTIN: The Inspector, the U.S. Attorney. My son is very dear to me, it's someone I love very much. He worked for me and they issued a subpoena for him to go down and report to the grand jury.

ROBBINS: They have issued one?

SPARTIN: That truly troubles me cause what they tried to tell me was look Spartin, you're in deep trouble. You've lied to us. We going to subpoena your son. We are going to charge him with obstruction of justice and we talked about that. That is the point that is troubling me.

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No. 95-2005

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The court of appeals in this case departed from well-settled law by accepting that allegations of witness coercion and misuse of grand jury testimony involve conduct that is

simply not "prosecutorial." Respondent's Opposition necessitates a reply because it includes distortions of the record and raises new issues of law through mischaracterization of the court of appeal's decision. Respondent erroneously argues that the circuit court's decision was based on findings of fact rather than errors of law in adopting its new *per se* rules. As a matter of sound and established policy, allegations that a prosecutor obtained an indictment through false or perjured testimony have heretofore been found to lie within the core of absolute immunity. Allegations against prosecutors sounding in malicious prosecution have long been barred by absolute immunity. Under this Court's functional analysis, efforts to prepare and control witnesses are prosecutorial and not investigative.

This case was decided by the district court and the appeals court based on the allegations in Respondent's complaint, as is required on motions under Fed. R. Civ. P. 12(b)(6).[1] In his opposition, however, Respondent has attempted to defend the court of appeals decision by either ignoring or misstating his own allegations and has further confused the record by introducing a large amount of material that goes beyond the complaint and which played no part in the decisions below.

ARGUMENT

Although Respondent studiously avoids quoting from his own complaint, that document demonstrates that his attempt to recast the court of appeals opinion as a fact-bound application of *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)

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[1] While the facts alleged must be taken as true, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), the motion to dismiss is decided, and reviewed, solely on the basis of the facts set out in the complaint. *See, e.g., Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985). Respondent attempts to change this settled principle by declaring that "the facts asserted by respondent must be taken as true" (Resp. 2), and then proceeding to assert all manner of so called facts that are not found in the complaint.

is misplaced. The decision is not based on any of the facts Respondent now attempts to insert in the record, nor does it turn on an analysis under *Buckley* as to when in the pre-indictment process the alleged misconduct occurred. This was undoubtedly the case because Respondent's complaint alleged that *all* of Petitioner's misconduct occurred in the course of his drive to allegedly abuse the grand jury to obtain an otherwise unobtainable indictment of Respondent. Specifically, Moore charged that:

> Defendants engaged in unusual, unlawful, and unconstitutional investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted.

Complaint, at ¶ 16; Pet. App. 59a.

The alleged misconduct held by the court of appeals to be outside the scope of absolute immunity involved two particulars in the complaint. First, Moore alleged that AUSA Valder tore up the immunity letter previously supplied to witness William Spartin and threatened to prosecute his son, in an effort to "coerce" and "intimidate" Spartin into providing testimony against Moore and REI in the grand jury. Complaint, at ¶ 21; Pet. App. 61a.[2] Second, Valder allegedly showed Spartin "Grand Jury testimony of other witnesses for the purpose of influencing [his] testimony." Complaint, at ¶ 22; Pet. App. 61a.[3]

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[2] Contrary to repeated statements in the Opposition (Resp. 6, 11), the complaint does not allege that Valder coerced Grand Jury witness Frank Bray. It appears that Respondent's source for this allegation is the trial testimony by Bray that has been attached as part of Respondent's appendix. *See* Resp. App. 21a.

[3] In the "Statement" portion of his opposition, Respondent has included a paragraph styled "The OPR Investigation." While this is another example of Moore's effort to distract from the actual *complaint*

The complaint restated its theory following these allegations by concluding: "Through the use of the above malicious, improper and unconstitutional tactics AUSA Valder . . . was able to obtain an indictment against [Moore]." Complaint, at ¶ 24; Pet. App. 62a.

The court of appeals relied on nothing more than the allegations in the complaint in announcing that two types of alleged misconduct were *per se* outside the bounds of absolute immunity. First, the court decreed that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory." *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995); Pet. App. 13a. Instead, the court held, such conduct is "a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete . . .," and that it "therefore relates to a typical police function, the collection of information to be used in a prosecution." *Id.* Second, the court ruled that "disclosing grand jury testimony to third parties is not advocatory because it has no functional tie to the judicial

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in this case, it must be observed that his characterization of the results of that investigation is grossly inaccurate and unfair, as demonstrated by a brief review of the Office of Professional Responsibility final report he attaches. *See, e.g.*, Resp. App. 13a ("there was simply no intent on the part of the prosecutor to do anything other than to present this case to the best of his ability"); 6a ("the allegation that the grand jury was misled regarding the state of knowledge of the defendants can not be sustained"); *id.* ("we found that there was sufficient basis for bringing the indictment"); 8a ("there was a rational basis for the U.S. Attorney to conclude that there was a probability of a conviction if the case were indicted"); *id.* ("the government did not seek to tailor the [grand jury] testimony"); 9a ("tearing up [Spartin's] non-prosecution letter . . . was not taken as a consequence of his inability to implicate [Moore and his codefendants] but solely because he could not recall attending a number of meetings where others had unequivocally placed him" and "we cannot conclude that the prosecutor's actions were unwarranted"); *id.* ("We found no support for [the] contention . . . that the prosecutor threatened to prosecute Spartin's son if he did not implicate [Moore and his co-defendants]"); 10a ("we cannot conclude that the prosecutor's actions [in using a grand jury exhibit to refresh Spartin] constitute a 6(e) violation"); 13a ("the deficiencies we have identified do not rise to the level of serious misconduct").

process." *Id.* at 195; Pet. App. 14a.

Despite Respondent's effort to recast the decision below by late-inning pleading, the appeals court did not base its decision on when the alleged misconduct took place with respect to a witness's appearance before the grand jury. Indeed, Respondent ignores that the two instances of alleged misconduct happened in the same functional context as the five others decreed by the appeals court to be barred by absolute immunity. There was no allegation below that Petitioner had engaged in some sort of pre-grand jury investigation and then moved on to present evidence in an effort to obtain an indictment; the crux of the complaint was that all the misconduct was part of a preconceived effort to subvert the grand jury process and maliciously prosecute Respondent.[4]

For that reason, the Second Circuit's decision in *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995), cited as a "curious[]" omission from Valder's petition (Resp. 16), actually supports the petition. That decision turned on the fact that the prosecutor had not established that his videotaping of a witness statement was for the sole purpose of presenting it to the grand jury. 45 F.3d at 662. The Second Circuit specifically noted that absolute immunity would be available if the prosecutor, as was alleged here, had already decided to indict. *Id.* ("We recognize that a prosecutor is immune from liability for out-of-court efforts to control a witness' grand jury testimony that are made subsequent to the decision to indict.") (citing *Buckley*). The D.C. Circuit cited *Hill* for purposes of applying absolute immunity to certain of Moore's allegations. 65 F.3d at 194; Pet. App. 13a. The panel did not cite *Hill* in its challenged

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[4] Despite Moore's new theory that Valder was really involved in a separable fact investigation *before* deciding to wrongly indict him, Respondent's own brief is unable to describe the case without revealing that it was a malicious prosecution action. *See, e.g.*, Resp. 4 (Valder and the postal inspectors were "retaliating against him for his criticisms of the postal service" and "decided to 'get' Moore" even though aware of his innocence).

holding that witness coercion was unprotected because, in this case, Moore's *claim* was that the prosecutor had decided to indict and engaged in the misconduct in pursuit of indictment. Indeed, the court of appeals could not rely on *Hill* and reach the result it pronounced.[5]

Respondent's effort to distinguish *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995) is mystifying. He asserts that the Fifth Circuit "did not address the coercion claim" in that case. On the contrary, the court recited that:

> Brandley asserts [the prosecutor] knew of and probably directed the intimidation of witnesses and suppression of other important evidence. The district court found that actions taken by [the prosecutor] were part of his efforts to prepare the State's case for trial and that such acts were wholly within the scope of his judicial function, citing *Imbler v. Pachtman* . . . . Taking Brandley's allegations as true, we hold that [the prosecutor] retained his absolute immunity from suit.

64 F.3d at 201. In short, the Fifth Circuit considered and rejected allegations of witness intimidation because it properly considered the context in which the allegations arose. *Brandley* is squarely in conflict with the decision below, which carves out all allegations of prosecutorial "intimidation" because, in that court's view, intimidation is police work.

Respondent is correct that a number of the other inconsistent cases from other circuits pre-date *Buckley*, but

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[5] As part of Respondent's vain search for comfort that the case law cannot supply and in his most ambitious voyage outside the record, he argues that this Court should be influenced by his assertion that the Department of Justice declined to seek certiorari, leaving the application in Valder's hands. Obviously, Respondent does not know what elements within the Department may have supported an application, what elements may have opposed, and the reasons for the final decision to hire private counsel to file the application for Valder.

the effort to distinguish them dies there. If the decision below turned on the *Buckley* court's statement that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested . . ." 509 U.S. at 274, then those cases decided before *Buckley* would obviously be of limited relevance. The court below, however, did not rest its holding on this language from *Buckley*. Rather, it simply announced that "coercion" is not something a prosecutor does; instead, it is a "misuse of an investigative technique" and "therefore relates to a typical police function . . . ." 65 F.3d at 194, Pet. App. 13a. Thus, the appeals court held that a prosecutor engaged in alleged coercion is never entitled to absolute immunity. What the other circuits have held both before and after *Buckley* is that allegations of coercion do not automatically eviscerate absolute immunity and that the court must examine -- as directed by *Buckley* and its predecessors -- what *function* the prosecutor was allegedly performing at the time.

Respondent's belated effort to recast this record to fit the *Buckley* and *Hill* model by now claiming that what Valder was really doing was "*exploring* 'whether the government ha[d] acquired all incriminating evidence' against Moore" (Resp. 8 (emphasis added) (citation omitted)), is telling and is decidedly at odds with his own complaint. Moore claimed that Valder was out to indict him from the outset and used all means at his disposal to fabricate evidence to accomplish that end. It was undoubtedly for that reason that the court of appeals did not engage in a *Buckley*-type analysis of whether the prosecutor believed he had probable cause to indict. The court simply announced -- without regard to the functional context -- that "coercion" and disclosure of grand jury testimony are not activities protected by absolute immunity.[6] It is precisely because the decision

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[6] Contrary to assertions in Respondent's brief in opposition, the court of appeals issued no decision with respect to Valder's entitlement to qualified immunity. It simply noted in *dicta* that "he of course would be entitled to any qualified immunity available to the postal inspectors." 65 F.3d at 195, n.8; Pet. App. 14a. Thus, "Valder has not challenged

below is not limited to the facts Respondent now "asserts" that it presents such a broad threat to prosecutorial immunity and requires review by this court.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

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the panel's qualified immunity ruling" (Resp. 9), because there was no such ruling as to him, nor should there have been given that his motion to dismiss on absolute immunity grounds had been granted in the district court.